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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

S. ROBERT DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ARTHUR F. MATHEWS
Counsel of Record
STEPHEN W. PRESTON
W. HARDY CALLCOTT
CHRISTOPHER J. MELCHER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

JOHN J. CHESTER
CHESTER, HOFFMAN, WILLCOX & SAXBE
17 South High Street
Suite 900
Columbus, Ohio 43215
(614) 221-4000
Counsel for Petitioner S. Robert Davis

LAURA D. BYRNE
5720 Avery Road
Amlin, Ohio 43002
(614) 889-7941
Of Counsel

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QUESTIONS PRESENTED

1. Where a criminal conviction following a jury trial is appealed on sufficiency of the evidence and other grounds, does the Double Jeopardy Clause require a reviewing court to determine the sufficiency of the evidence before the defendant may be retried for the same offense?

2. Does the Double Jeopardy Clause bar a second prosecution for the same offense where the government, over the defendant's timely and specific objections, deliberately relied on an invalid theory, thereby preventing the defendant from obtaining a valid determination of guilt or innocence at the first trial?

3. Does the statute of limitations for federal crimes create an explicit right not to be tried, the denial of which is immediately appealable under the collateral order doctrine?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner S. Robert Davis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit for which a writ of certiorari is sought is reported at 873 F.2d 900 (1989), and is reprinted as Appendix A, pp. 1a-19a, *infra*. The order of the court of appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc is unreported, and is reprinted as Appendix C, p. 51a, *infra*. The opinion and order of the United States District Court for the Southern District of Ohio are unreported, and are reprinted as Appendix B, pp. 20a-50a, *infra*.

JURISDICTION

The jurisdiction of the United States District Court for the Southern District of Ohio was based on 18 U.S.C. § 3231. The order of the district court denying petitioner's pretrial motions, *inter alia*, to dismiss the Superseding Indictment on double jeopardy and statute of limitations grounds was entered on October 12, 1988. Petitioner sought review of that order on the same day in the United States Court of Appeals for the Sixth Circuit pursuant to the collateral order exception to the final judgment rule, 28 U.S.C. § 1291, and pursuant to 28 U.S.C. § 1651. The court of appeals issued a decision affirming the double jeopardy rulings and declining to address the statute of limitations ruling of the district court on April 25, 1989. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amendment V:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

United States Code, Title 18, section 3282 (1982):

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

STATEMENT OF THE CASE

Petitioner S. Robert Davis is a successful real estate developer in Ohio. This petition arises from the government's second attempt to prosecute Davis under the federal mail fraud statute, 18 U.S.C. § 1341, for events occurring in 1981. The first attempt—in which the government indicted and tried Davis on an "intangible

rights" theory of mail fraud—ended when the United States Court of Appeals for the Sixth Circuit reversed Davis' conviction on the authority of this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987). Following reversal, as instructed by the court of appeals, the district court dismissed the original Indictment. The government thereafter secured what purports to be a "Superseding Indictment," charging the same mail fraud offenses based on the same events in 1981, but this time relying on a conventional "money or property" theory.

The issue presented in the original Indictment and at the initial trial was whether Davis had devised a scheme whereby Davis and Harold Hyrne, the City Manager of Upper Arlington, Ohio, together deprived the citizens of Upper Arlington of Hyrne's honest and faithful services in connection with a waterline that Davis built in his neighborhood on Squirrel Bend Road. The government's theory was that Davis and Hyrne had schemed to subvert the cost recovery procedure provided for under the city code and applicable when anyone tapped into a waterline. Later, Davis allegedly provided Hyrne an opportunity to purchase common stock in a start-up company at a discounted price. *See* App. G, pp. 62a-68a.

The government determined prior to trial that it would proceed on this "intangible rights" theory of mail fraud, and the Indictment returned by the grand jury was limited accordingly.[1] More than two months before trial, Davis filed a motion to dismiss the Indictment for failure to allege a legally cognizable "scheme to defraud" under 18 U.S.C. § 1341. In support of this motion, Davis presented arguments and authorities indicating that the "intangible rights" allegations in the Indictment did not

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[1] *See* App. H, pp. 69a-73a (*United States v. Davis*, No. 86-4076, slip op. at 2-3 (6th Cir. Mar. 8, 1988) (per curiam)).

charge a valid offense under the statute. Davis maintained that the prosecution could have charged a traditional "money or property" scheme in the Indictment had it wanted to, but did not do so. In response to Davis' pretrial motion, the government stood by its Indictment as drawn, refusing to consider that its theory might be invalid. The district court denied Davis' motion on August 21, 1986.

Davis was tried by a jury before the Honorable Joseph P. Kinneary, commencing on September 15, 1986. Trial developed the following undisputed facts: In late 1980 or early 1981, Hyrne asked Davis to consider privately constructing the Squirrel Bend waterline at his own expense and later provided Davis with a copy of the city engineer's estimate. Davis ultimately agreed to build the waterline in order to provide fire hydrant protection for the expensive homes along Squirrel Bend. Davis himself undertook all responsibilities and risks to bring the job to completion. At Hyrne's request, Davis provided a cost estimate that reflected the direct cost of excavation and installation, profit, overhead and other items.

One neighbor, Richard Schultz, subsequently approached Hyrne and requested city permission to tap into the line. He did not approach Davis, as contemplated by the city code and by Davis. Unbeknownst to Davis, Schultz's attorney negotiated a tap-in fee directly with Hyrne; Schultz was charged a total of $9,300. Pursuant to the city code, the City passed that amount on to Davis' wife, the record owner of the Squirrel Bend property.[2]

Some time later, a company in which Davis was a significant shareholder was engaged in the initial public offer-

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[2] Four mailings involved in assessing and collecting the tap-in fee from Schultz, and passing it on to Davis' wife were the jurisdictional underpinnings of the four mail fraud offenses charged in the Indictment.

ing of its common stock. Hyrne was among the many potential investors solicited to purchase stock in the offering. Hyrne testified that several months after completion of the Squirrel Bend waterline Davis had given him a $3,000 discount on the purchase of 1,500 shares of the company's stock. Davis disputed that testimony, and presented testimonial and documentary evidence demonstrating that Hyrne had paid the full offering price.

After seven days of trial, three days of deliberations and an *Allen* charge, the jury returned a verdict of guilty on each of the four counts in the Indictment. The court imposed a sentence of three years' probation and a fine of $4,000, and entered a judgment of conviction on November 14, 1986.[3] Davis appealed. On appeal, Davis argued principally that the mail fraud statute required a scheme involving "money or property" and hence the "intangible rights" theory pursued by the government was impermissible, and that the evidence at trial was insufficient to prove beyond a reasonable doubt the existence of the alleged scheme to defraud.[4] The government responded again by arguing the legal propriety of the "intangible rights" scheme charged in the Indictment.

On the basis of this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), the court of appeals reversed Davis' convictions because the jury had been "permitted to find the defendant guilty of mail fraud, under the intangible rights theory, without finding that anyone was wrongly deprived of money or property." App. H, at 77a. The court of appeals then remanded the case to the district court with instructions to dismiss

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[3] Davis began serving the sentence immediately and promptly paid the fine.

[4] Davis made it clear that he was foregoing any claims of trial error, raising only issues which would end the litigation without retrial. *See* note 22, *infra*.

the Indictment. App. H, at 73a. The court, however, did not address Davis' sufficiency of the evidence claim, although it was specifically raised as a point of error on appeal.[5] The court of appeals' mandate was issued on June 16, 1988; on June 27, 1988, the district court entered an order dismissing the original Indictment in this case.

Shortly thereafter, on July 7, 1988, the government proceeded to file a so-called "Superseding Indictment," even though the applicable five-year statute of limitations had expired previously. The Superseding Indictment alleges the traditional "money or property" scheme that the government refused to pursue at the first trial. The four jurisdictional mailings are precisely the same as those recited in the original Indictment. But the Superseding Indictment alleges a different scheme to defraud—one involving "money and property"—with a different victim, a different injury and different intent on Davis' part. Instead of charging that Davis intended to defraud the citizens generally of their right to the honest and faithful government service of City Manager Hyrne, the Superseding Indictment charges that Davis intended to defraud neighbor Schultz of money or property by collecting from him an inflated waterline tap-in fee. *See* App. F, pp. 55a-61a.[6]

Prior to retrial, Davis moved to dismiss the Superseding Indictment, *inter alia*, on double jeopardy and stat-

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[5] The government filed a petition for rehearing—now insisting that its theory had encompassed a "money or property" scheme—which Davis opposed and the Court denied. *See* Petition of the United States of America for Rehearing (4/20/88); Response of S. Robert Davis to Petition of the United States of America for Rehearing (5/11/88); Order (6th Cir. 6/9/88).

[6] At the first trial, it was conceded that Schultz was the only neighbor who had ever paid Davis a tap-in fee. The Superseding Indictment casts Schultz as the only actually defrauded victim, alleging that Davis devised a scheme to defraud Schultz and unidentified "future property owners who would tap into the waterline." App. F, at 56a.

ute of limitations grounds. These motions were denied by the district court. App. C, pp. 20a-50a. The district court held that the government's reprosecution of Davis for the same offenses—on a theory the government had refused to press at the first trial despite Davis' repeated warnings—did not violate the Double Jeopardy Clause. The district court further held that neither the court of appeals' failure to consider the sufficiency of the evidence at the first trial nor the statute of limitations barred retrial. Pursuant to 28 U.S.C. § 1291, Davis appealed from the district court's denial of his motions.[7]

The court of appeals affirmed on April 25, 1989. App. A, 1a-19a. The court held that the Double Jeopardy Clause did not bar retrial for the same offense, even though the government had deliberately pursued an invalid theory at the first trial. The court approved its decision in the earlier appeal not to rule on Davis' claim that the evidence at the first trial was insufficient, finding such a review "pointless" and "inappropriate." App. A, at 14a-15a. Finally, the court held that it lacked jurisdiction to consider Davis' statute of limitations claim because such a claim was not "effectively unreviewable" and thus did not fall within the collateral order exception to the final judgment rule.[8] The court of appeals denied Davis' petition for rehearing and suggestion for rehearing en banc on June 16, 1988. App. C, p. 51a.

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[7] *See* App. E, p. 53a. Davis argued that both the double jeopardy rulings and the statute of limitations ruling were immediately appealable under *Abney v. United States*, 431 U.S. 651 (1977). However, in order to ensure a jurisdictional basis for review of the statute of limitations ruling, Davis also filed a precautionary petition for writ of mandamus pursuant to 28 U.S.C. § 1651. *See* App. D, p. 52a.

[8] The court also declined to grant mandamus without, however, reaching the merits of the statute of limitations claim. App. A, at 19a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD SETTLE THE QUESTION WHETHER, UPON REVERSAL OF A CONVICTION ON OTHER GROUNDS, THE DOUBLE JEOPARDY CLAUSE BARS RETRIAL OF THE DEFENDANT FOR THE SAME OFFENSE WITHOUT AN APPELLATE DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE AT HIS INITIAL TRIAL.

Petitioner Davis has earnestly pressed at every possible opportunity his contention that the evidence at his first trial was insufficient as a matter of law to support convictions on each of the four mail fraud offenses alleged.[9] But, after two separate appeals, he now faces a second trial for the same mail fraud offenses without ever having obtained an appellate determination on the question of sufficiency.[10] If, as Davis contends, the govern-

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[9] As the court below noted, the factual issues in the case are "somewhat complex." App. A, at 15a. The predicate for all four counts of mail fraud was an alleged scheme including (i) the submission of what the government describes as a false "cost certification" to the City of Upper Arlington; (ii) the failure to pay inspection fees to the City; and (iii) the payment of a gratuity in the form of a discount on the purchase of newly issued stock. The evidence at trial established (i) that the document relied on by the government was not and could not have been a "cost certification" under applicable local law, and in any event was not false; (ii) that the inspection fees in question were not owing and in any event were paid in full when billed; and (iii) that there was no stock discount inasmuch as the official who bought the stock did so at its full offering price. Hence, the government failed to prove the existence of the alleged scheme in any of its critical aspects. Nor did the government succeed in proving that the scheme was in any sense one to defraud. Indeed, Davis demonstrated conclusively that the only "victim" of the scheme actually received a bargain. The government has at no time contended that it was prevented from introducing any relevant evidence at the first trial. *Cf. Lockhart v. Nelson*, 109 S. Ct. 285 (1988).

[10] The panel in the earlier appeal made no mention of Davis' sufficiency claim when reversing on *McNally* grounds. *See* App. H,

ment failed to prove its case at the first trial, then the Double Jeopardy Clause of the Fifth Amendment bars the imminent second trial for the same offenses.[11] The constitutional guarantee against double jeopardy cannot be satisfied here unless an appellate court, prior to retrial, determines whether the evidence at the first trial was legally sufficient.

Thus, this petition presents a question at the very foundation of double jeopardy principles: whether a defendant once tried and convicted may be compelled to stand trial again for the same offense when the court of appeals chooses to reverse on other grounds without reviewing the sufficiency of the evidence. Prior to the Sixth Circuit's decision in this case, the answer was clearly no. Four Members of this Court have concluded that under such circumstances an appellate determination of sufficiency is mandated; none of the Court's Members has reached a contrary conclusion. Moreover, all other courts of appeals presented with the question have disagreed with the result in the court below. In the absence of a decision directly on point by a majority of this Court, however, the decision below generates considerable uncertainty—uncertainty that is intolerable given the critical role of sufficiency review in criminal appeals. The case at bar provides the Court the opportunity to establish more clearly and firmly the law on this important question, and to restore uniformity among the Circuits.

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pp. 69a-73a. While the panel in the more recent appeal opined in *dicta* that the government "was not way out in left field" at the first trial, App. A, at 15a, it explicitly declined to "sift through several days' worth of trial evidence to determine whether the evidence would have been sufficient to support a conviction," App. A, at 13a.

[11] U.S. Const., amend. V; *see Burks v. United States*, 437 U.S. 1 (1978) (Double Jeopardy Clause bars retrial where evidence was insufficient at initial trial). The same rule applies to the states. *See Hudson v. Louisiana*, 450 U.S. 40 (1981); *Jackson v. Virginia*, 443 U.S. 307 (1979); *Greene v. Massey*, 437 U.S. 19 (1978).

A. The Decision of The Court Below Conflicts With The Opinion of Those Justices Who Have Addressed The Question And is Otherwise Inconsistent With The Double Jeopardy Precedents of This Court.

In *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), Justice Brennan stated the view of a plurality of this Court:

> Because the first trial has plainly ended, "retrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the [constitutional standard for sufficiency]. Hence, the [sufficiency] issue cannot be avoided; if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict."

Id. at 322 (Brennan, J., concurring, joined by Marshall, J.) (quoting *Tibbs v. Florida*, 457 U.S. 31, 51 (1982) (White, J., dissenting, joined by Brennan, J., Marshall, J., and Blackmun, J.)) (brackets in original). As the Seventh Circuit recently observed:

> At least four of the nine justices currently on the Court support the proposition that where a first trial results in conviction, as here, an appellate court cannot reverse the conviction because of trial error and decline to review the sufficiency of the prosecution's evidence, at least where the defendant raises the issue.

United States v. Douglas, 874 F.2d 1145, 1150 (7th Cir. 1989). Yet the court of appeals in this case held that regardless of the sufficiency of the government's evidence at the first trial, Davis must endure a second trial on the same charges, and will never be entitled to a review of the evidence at his first trial. This Court should review the judgment below because it cannot be reconciled with the clear direction provided in *Lydon*, nor with this Court's other precedents.

In *Richardson v. United States*, 468 U.S. 317 (1984), the Court first held that a criminal defendant may appeal

before his second trial a claim that the evidence at his first trial was insufficient as a matter of law to establish guilt beyond a reasonable doubt. *Id.* at 320-322.[12] The Court then made it clear that a court of appeals must normally review the sufficiency of the evidence at a defendant's initial trial before the defendant may be retried on the same allegations. *Id.* Where the jury in the initial trial could not reach a verdict and the court declared a mistrial, the Court went on to hold, the defendant's jeopardy did not terminate, and there was no predicate for a claim of double jeopardy. *Id.* at 326.[13] In that limited circumstance, the court of appeals is relieved of its obligation to make a sufficiency determination. The teaching of *Richardson* is that where, as here, there has been a conviction—such that a reversal for insufficiency would most certainly trigger double jeopardy—it remains the duty of the court of appeals to ascertain whether, in fact, the evidence was sufficient.

The Court's decision in *Lockhart v. Nelson*, 109 S. Ct. 285 (1988), supports this view. In *Lockhart*, the Court wrote:

> Because the Double Jeopardy Clause affords the defendant who obtains a judgment of acquittal at the trial level absolute immunity from further prosecution for the same offense, it ought to do the same for the defendant who obtains an appellate determination that the trial court *should* have entered a judgment of acquittal. . . . The fact that the determination of entitlement to a judgment of acquittal is made by the appellate court rather than the trial

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[12] *See Abney v. United States*, 431 U.S. 651 (1977) (holding immediately appealable double jeopardy claims not relating to sufficiency of the evidence).

[13] Justices Brennan and Marshall concurred on the appealability issue, and would have held that a sufficiency review was necessary even in the event of a hung jury. 468 U.S. at 326. Justice Stevens would have held that the Court lacked jurisdiction over the appeal. *Id.* at 332.

> court should not, we [think], affect its double jeopardy consequences; to hold otherwise "would create a purely arbitrary distinction" between defendants based on the hierarchical level at which the determination was made.

Id. at 290 (emphasis in original, citations omitted). Allowing retrial because the reviewing court simply refuses to determine whether the defendant was entitled to a judgment of acquittal would introduce a distinction even more "purely arbitrary" than that discussed in *Lockhart*. The necessary implication of *Lockhart* is that a reviewing court must assess the evidence whenever its sufficiency is challenged.

The court below reasoned that a second trial in this case should be regarded as " 'an enlarged, fact-sensitive part of a single, continuous course of judicial proceedings,' " and therefore no review of the sufficiency of the evidence at the first trial was necessary. App. A, at 14a (quoting *Lydon*, 466 U.S. at 309). The implication—that a verdict of guilty after a full trial does not terminate a defendant's jeopardy—is contrary to the long-settled doctrine of this Court that a conviction terminates jeopardy.[14] This Court has applied the "continuing jeopardy" notion only in cases involving mistrials,[15] appellate reversals for trial error where the evidence was sufficient,[16] and a two-tiered state court system.[17] The court

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[14] *See, e.g., In re Nielsen*, 131 U.S. 176 (1889); *Ex parte Lange*, 85 U.S. 163 (1874).

[15] *See Richardson*, 468 U.S. at 323-24 (collecting cases).

[16] *See, e.g., Montana v. Hall*, 481 U.S. 400, 403 (1987) (reversing for trial error and remanding on premise that "[t]here is no suggestion that the evidence introduced at trial was insufficient to convict").

[17] *See Lydon*, 466 U.S. at 294. The passage from the *Lydon* opinion on which the court below relied is inapposite. There, the defendant knowingly agreed to be tried in the lower tier of a two-tiered court system and had an absolute right to a trial *de novo*

below conceded that had Davis been acquitted in his original trial, he could not be retried at this stage. App. A, at 10a. Having conceded this, it defies reason to hold that he is not entitled to a determination whether, as a matter of law, he should have been acquitted in that trial.

In declining to address Davis' sufficiency claim, the court below carved out an exception to the rule requiring appellate review of such claims following conviction: "[w]hether or not the evidence presented earlier would have warranted conviction under a valid indictment, the salient fact is that there was no such indictment earlier . . . ." App. A, at 14a. The court cites no authority for such an exception, and there is no reason to create one. Indeed, it would lead to such absurd results as extending double jeopardy protection to one who suffers through trial and whose conviction is reversible based on evidentiary rulings, as well as insufficiency, while denying such protection to someone who is put through the same ordeal, but whose conviction may be overturned because of some defect in the indictment, in addition to insufficiency.

Tellingly, the court below refused to review the evidence *not* because double jeopardy is not fully implicated here, but because "considerations of judicial economy" counseled against it! App. A, at 14a. This Court should issue the writ in order to make it perfectly clear that neither the difficulty in determining whether the evidence adduced would support an otherwise valid conviction, nor the possibility that the government would fail to prove

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in the higher tier if he lost in the first instance. The decision in *Lydon* rests on notions of consent and waiver entirely lacking in this case. *See also id.* at 321-22 (Brennan, J., concurring) ("when a defendant challenging his conviction on appeal contends both that the trial was infected by error and that the evidence was constitutionally insufficient, the court may not . . . ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial").

its case the second time around, *see id.*, can justify abrogation of a defendant's Fifth Amendment rights.

B. There is a Conflict Between The Decision of The Court Below And The Holding of Every Other Court of Appeals to Confront The Question.

Virtually every court of appeals has faced the issue presented in this case and, with the exception of the court below, all of those ruling on the issue have held that a defendant convicted in one trial is entitled to a determination of the sufficiency of the evidence at that trial before facing retrial on the same charges.[18] A number of courts have stated that courts have a constitutional duty to decide the sufficiency of the evidence in every criminal appeal in which the issue is raised.[19] While the court below believed that the duty to evaluate the evidence at a prior trial is excused where the indictment at that trial was legally insufficient, other courts review sufficiency in exactly such circumstances.[20]

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[18] *See United States v. Gonzales-Sanchez*, 825 F.2d 572, 588 n.56 (1st Cir.), *cert. denied*, 108 S. Ct. 510 (1987); *United States v. Ustica*, 847 F.2d 42, 47-48 (2d Cir. 1988); *United States v. United States Gypsum Co.*, 600 F.2d 414, 416 (3d Cir.), *cert. denied*, 444 U.S. 884 (1979); *United States v. Manbeck*, 744 F.2d 360, 391 (4th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985); *United States v. Sneed*, 705 F.2d 745, 748-49 (5th Cir. 1983); *Webster v. Duckworth*, 767 F.2d 1206, 1214 (7th Cir. 1985), *cert. denied*, 475 U.S. 1032 (1986); *Palmer v. Grammer*, 863 F.2d 588 (8th Cir. 1988); *United States v. Marolda*, 648 F.2d 623, 624 (9th Cir. 1981); *United States v. Jelsma*, 630 F.2d 778, 779 (10th Cir. 1980); *United States v. Palzer*, 731 F.2d 1484, 1485 (11th Cir. 1984).

[19] *See Vogel v. Commonwealth of Pennsylvania*, 790 F.2d 368, 376 (3d Cir. 1986); *United States v. Bibbero*, 749 F.2d 581, 585-87 (9th Cir. 1984), *cert. denied*, 471 U.S. 1103 (1985); *United States v. Morris*, 612 F.2d 483, 492 (10th Cir. 1979); *cf. United States v. Douglas*, 874 F.2d 1145 (7th Cir. 1989) (declining to reach issue of constitutional entitlement, but imposing such a requirement as a matter of conservation of judicial resources).

[20] *See United States v. Snell*, 592 F.2d 1083, 1085 n.2 (9th Cir.), *cert. denied*, 442 U.S. 944 (1979); *cf. United States v. Hayes*, 676 F.2d 1359, 1363 n.1 (11th Cir.), *cert. denied*, 459 U.S. 1040 (1982).

The decision of the court below conflicts with those of every other court of appeals to consider this issue. To resolve this split among the circuits, this Court should review the judgment below.

II. THE COURT SHOULD DETERMINE WHETHER, WHERE THE GOVERNMENT CHOSE TO RELY ON AN INVALID THEORY IN THE FIRST PROSECUTION AND THE DEFENDANT'S CONVICTION HAS BEEN REVERSED AS A RESULT, THE DOUBLE JEOPARDY CLAUSE BARS REPROSECUTION ON A VALID THEORY THAT WAS PREVIOUSLY AVAILABLE BUT DELIBERATELY NOT PURSUED.

The court of appeals in this case held that the Double Jeopardy Clause does not bar reprosecution of Petitioner Davis even though his first trial ended inconclusively solely as a result of the government's intentional acts and despite Davis' fervent efforts to secure a valid verdict from the first jury. The government's attempt to subject Davis to a second trial for the same offenses by means of reindictment on a new theory eviscerates his right under the Double Jeopardy Clause to have the first tribunal determine his guilt or innocence, and threatens him "for the same offence to be twice put in jeopardy." [21] If the decision below is not reversed, there will be no limit to the number of successive prosecutions the government can bring against a criminal defendant using superseding indictments that embrace the same events.

In returning the original Indictment and presenting proof at Davis' initial trial, the government deliberately chose to rely on the "intangible rights" theory of mail fraud rather than the traditional "money or property" theory. Davis objected to the government's actions in a timely and continuing fashion, repeatedly informing the prosecution before and during the trial that he

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[21] U.S. Const., amend. V.

could be prosecuted only on the traditional "money or property" theory. The government persisted despite the attendant risks. It could have reindicted or superseded the existing indictment prior to trial on a proper theory within the applicable statute of limitations, but refused to do so. Ultimately, the flawed conviction was reversed and the original Indictment dismissed on authority of *McNally v. United States*, 483 U.S. 350 (1987).[22] The government has since reindicted Davis and now seeks to try him again for the same four mail fraud offenses, this time on a traditional "money or property" theory.

In permitting a second prosecution in this case, the Sixth Circuit believed that, although the government tried Davis to a verdict and the resulting conviction was reversed for legal insufficiency on appeal, Davis' jeopardy did not, *and could not*, terminate. The Sixth Circuit reached this result by pronouncing that this Court in *Montana v. Hall*, 481 U.S. 400, 404 (1987), on authority of *United States v. Ball*, 163 U.S. 662 (1896), made it "clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument." App. A, at 7a. The Sixth Circuit construed *Ball* to embody a broad "concept of continuing jeopardy,"[23] such that reversal for a legal defect can *never* constitute the termination of jeopardy.

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[22] Davis also made clear from the start that he wanted but one trial, that he was entitled to be subjected to only one prosecution, and that he was entitled to have his innocence or guilt determined by the first (and only) jury to hear his case. *See United States v. Jorn*, 400 U.S. 470, 484 (1971) (opinion of Harlan, J.) Indeed, in appealing his conviction, he expressly waived all trial error and pursued only those claims which, if successful, would spare him a second trial: (i) insufficiency of the evidence, (ii) legal insufficiency of the "intangible rights" scheme, and (iii) statute of limitations (petitioner argued the absence of any jurisdictional mailings within the limitations period, which if sustained would time-bar further prosecuton).

[23] App. A, at 6a (quoting *Price v. Georgia*, 398 U.S. 323, 326 (1970)).

Davis respectfully suggests that such an interpretation of *Montana v. Hall* and *Ball* undermines the purposes of the Double Jeopardy Clause, and that, if necessary, the *Ball* case (decided nearly 100 years ago) should be limited to the facts presented or overruled. In *Ball*, the Court held that the Double Jeopardy Clause did not bar retrial following reversal on appeal of two convictions returned on a fatally defective indictment. However, the defects in the indictment in *Ball* were *de minimus*—the charging instrument failed to allege the time or place of the decedent's death. It surely did not involve strategic decisions deliberately made by the government in framing the Indictment and conducting the trial, nor did it involve successive prosecutions asserting new theories *in seriatim*. *Ball* never addressed the effect of prosecutorial conduct of the sort presented here; to the extent that it has now been interpreted to influence or govern that issue, it should be limited or overruled. The authority of *Ball*, as have already the authority of numerous other double jeopardy cases from the past, must be reassessed to accommodate the modern world evolution of double jeopardy principles.[24]

This Court has consistently held that one of the principal purposes of the Double Jeopardy Clause is to limit the government to one, *and only one*, full and complete opportunity to obtain a conviction of an indivadual for an alleged offense.[25] This is necessary in order to protect

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[24] *See* Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation* (Supp. 1980) at S163.

[25] For example, in *Green v. United States*, 355 U.S. 184 (1957), the Court stated:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all of its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of

every defendant's "valued right" to have his dispute with the government ended in one trial before the first jury which hears his case.[26] In preserving this constitutional right, the Court has developed and relied upon two principal branches of double jeopardy jurisprudence: the "acquittal" branch and the "mistrial" branch.

It is by now settled that the Fifth Amendment's protection against successive trials following acquittal, "however mistaken the acquittal may have been," is absolute. *United States v. Scott*, 437 U.S. 82, 91 (1978). The Court has also considered the reversal of a conviction on appeal for insufficiency of the evidence as an "acquittal equivalent," barring retrial. *Burks v. United States*, 437 U.S. 1 (1978).[27] In addition, the Court has held that several other grounds warranting reversal on appeal may bar retrial, thus having the same effect as an "acquittal equivalent": (i) a valid defense of insanity, (ii) a valid defense of entrapment, (iii) statute of limitations, and (iv) denial of the right to speedy trial.[28]

The second branch of double jeopardy jurisprudence is the "mistrial" branch, where jeopardy has attached and

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anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-88; *see Arizona v. Washington*, 434 U.S. 497, 503-05 (1978); *United States v. Wilson*, 420 U.S. 332, 345-46 (1975).

[26] *Jorn*, 400 U.S. at 483-85 (opinion of Harlan, J.).

[27] Thus, the bar against successive trials will apply with equal force whether the acquittal is by jury, or by trial or appellate court decision finding the evidence adduced insufficient to support a verdict of guilty. *See, e.g., Lockhart*, 109 S. Ct. at 290 ("to hold otherwise 'would create a purely arbitrary distinction' between defendants based on the hierarchical level at which the determination was made"); *Tibbs v. Florida*, 457 U.S. 31, 41 (1982).

[28] *See Scott*, 437 U.S. at 95, 97-98, 103; *id.* at 111 (Brennan, J. dissenting); *United States v. Oppenheimer*, 242 U.S. 85 (1916); *Downum v. United States*, 372 U.S. 734 (1963).

a mistrial is declared before a verdict is reached. There, retrial is barred unless the mistrial was granted for reasons of "manifest necessity" [29] or on defendant's own motion. *Scott*, 437 U.S. at 96. When the defendant himself moves for a mistrial, he is deemed to have "waived" his interest in obtaining a determination of the factual issues by the first tribunal. But there are exceptions where double jeopardy applies even with a mistrial granted at the defendant's request, as where the defendant is forced to move for a mistrial by intentional prosecutorial misconduct. *Oregon v. Kennedy*, 456 U.S. 667 (1982).[30]

Where retrial is barred following a mistrial sought by the defendant, this Court's view of double jeopardy has focused on who is *responsible* for the failure of the first trial to reach a valid verdict.[31] Where the government is responsible for a mistrial—*e.g.*, through intentional or deliberate misconduct—a second trial is barred despite the fact that it is the defendant who actually files the

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[29] *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

[30] This predicament is closely analogous to the situation with Davis. Despite his every effort, the government insisted on pressing an invalid theory at the first trial, thus forcing him to appeal his conviction and overturn the flawed result.

[31] As the Court recognized in *Scott*, the principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense," *Green v. United States*, 355 U.S. at 187, "is not a principle which can be expanded to include situations in which the defendant is *responsible* for the second prosecution," *Scott*, 437 U.S. at 95-96 (emphasis added). Where the defendant is responsible for the mistrial motion or the successful appeal of his conviction based upon trial error, double jeopardy does not bar a second trial that seeks to correct the flaw in the process. Thus, for instance, where the defendant "lies in the weeds" and invites error in the trial court, he can hardly complain about retrial following reversal on appeal.

motion or appeal.[32] This result is necessary to prevent the government from abusing the trial process, in effect trying out invalid theories or methods in successive trials until the defendant capitulates.

As the case at bar demonstrates, there is a class of cases which for double jeopardy purposes fall between the "acquittal" branch and the "mistrial" branch, between "the two poles established in *Scott*" and expanded elsewhere.[33] In *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988), the Sixth Circuit held that the government could not, consistent with the Double Jeopardy Clause, retry a defendant for murder (following reversal of his conviction on appeal) on a theory the government chose not to press the first time. The trial court in *Saylor* instructed the jury, with the acquiescence of the prosecutor and over the objections of Saylor, solely on a conspiracy theory and not on an accomplice theory, even though considerable evidence was presented to support accomplice liability and none was introduced to support conspiracy liability. Thus, "due to the action of the prosecution," a full and fair trial before the first tribunal ended without a valid conviction or an acquittal. *Id.*, at 1407.

Recognizing that this Court "has also developed a body of law guarding the . . . interest of a defendant in avoiding multiple prosecutions," [34] the Sixth Circuit held that Saylor could not be placed in jeopardy again on the same murder charge. The court found that "where the first trial end[s] without a verdict on the relevant charge for reasons of the prosecution's making . . . ," 845 F.2d at

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[32] *See Oregon v. Kentucky*, 456 U.S. 680 (1982); *United States v. Dinitz*, 424 U.S. 600 (1976).

[33] *Saylor v. Cornelius*, 845 F.2d 1401, 1407 (6th Cir. 1988).

[34] *Scott*, 437 U.S. at 92; *see also id.*, at 100-01 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)) (defendant has a "valued right to have his trial completed by a particular tribunal").

1403, the result is "a termination of the jeopardy in which [the defendant has] been placed at the start of the trial, without a conviction or an acquittal, but a termination nonetheless," *id.* at 1404.[35] The court recognized the obvious danger: "permitting a retrial in this case or in any similar case could [render subsequent prosecutions] fraught with the possibility of manipulation." *Id.*, at 1408.[36] Indeed, the court below recognized this danger as well, at least in theory. App. A, at 9a.

Davis is now threatened with the embarrassment, expense and ordeal of a second trial for the same offenses that were the subject of the first trial, due solely to the deliberate acts of the government. The second prosecution charges the same offenses, but is now based on a different theory—one that the government was aware of, had at their disposal, and intentionally chose not to present for indictment to the grand jury nor to press at the first trial. Davis objected to the "intangible rights" theory from the very outset, literally months before the start of the trial when jeopardy first attached. Yet, despite persistent and detailed objections, the government obstinately chose to proceed on the invalid theory and forsake the clearly valid one—all for greater ease of conviction.

The court of appeals, in its opinion below, recognized that the mistrial branch of double jeopardy bars a second trial "where the [initial] proceedings end inconclusively as a result of the prosecutor's action," App. A, at 12a,[37]

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[35] Here, just as in *Saylor*, the government "had the option of [selecting from among] a number of theories of criminal liability. . . . The prosecution's failure to . . . [select the correct] theory of criminality cannot, *nunc pro tunc*, erase the defendant's jeopardy." 845 F.2d at 1409.

[36] If retrial were permitted, a "prosecutor could indict on several counts or theories, present evidence on each of them, and then go to the jury only on selected ones, in effect holding the others in reserve for a subsequent or improved effort." 845 F.2d at 1408.

[37] *See Saylor*, 845 F.2d at 1407-08.

but erroneously limited such instances to those where the prosecutor was culpable as well as responsible. App. A, at 9a-11a. The opinion is in conflict with this Court's double jeopardy jurisprudence that bars a second trial where the failure of the first trial to reach a valid verdict is due to the prosecutor's intentional acts. *See Oregon v. Kennedy*, 456 U.S. 667 (1982). There can be no doubt but that the government, not Davis, was "responsible" for the denial of Davis' constitutional right to have his guilt or innocence determined by the first tribunal. It lies upon the shoulders of the government to bear the weight of its decision. To force a defendant to bear the burden of a second trial despite every conceivable effort to avoid an invalid verdict at the first, would rob the defendant of any meaningful right to have his guilt or innocence determined by the first tribunal he faces.

This Court should review the decision below in order to correct an erroneous interpretation of the Double Jeopardy Clause and to clarify the fundamental protections due defendants threatened with successive prosecutions for the same offense.

III. THE COURT SHOULD DETERMINE WHETHER THE STATUTE OF LIMITATIONS FOR FEDERAL CRIMES CREATES AN EXPLICIT RIGHT NOT TO BE TRIED SUCH THAT CLAIMS BASED ON THE STATUTE ARE IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE.

The question of double jeopardy aside, the petition draws into sharp relief another issue of central importance to the administration of justice in the federal system: whether Title 18, section 3282 creates a right not to be tried on a time-barred indictment such that statute of limitations claims are immediately appealable under the collateral order exception to the final judgment rule.[38] Although this Court has never squarely

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[38] *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

addressed the issue presented here, its analysis in recent cases makes clear that the Sixth Circuit erred in deferring appellate review until final judgment in this case. Certiorari is warranted not just to correct the error here. Given that section 3282 governs virtually all federal criminal prosecutions, and given the absence of a decision by this Court addressing that provision, a pronouncement on the issue presented would provide important guidance in defining the contours of federal appellate jurisdiction.

On appeal, Petitioner Davis sought to challenge the Superseding Indictment, as he had in the district court, on the ground that the applicable limitations period under 18 U.S.C. § 3282 had expired.[39] The court of appeals concluded that the district court's ruling was completely separate from the merits and assumed, correctly, that the district court had conclusively determined the questions raised. App. A, at 16a.[40] The court then held that Davis'

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[39] As the court below did not reach its merits, Davis' statute of limitations claim is not now before this Court. Briefly, it is undisputed that the limitations period, even if tolled during the pendency of the original Indictment, expired before the Superseding Indictment was returned, and that the Superseding Indictment is timely only if it falls within the so-called "savings clause" under 18 U.S.C. § 3288. The Superseding Indictment is not "saved" because the original Indictment was not dismissed pretrial "for any error, defect, or irregularity with respect to the grand jury," or some similarly technical defect, as section 3288 requires. *See United States v. Peloquin*, 810 F.2d 911, 912 (9th Cir. 1987) (no tolling where dismissal for speedy trial violation). In any case, the Superseding Indictment is time-barred because its "money or property" charges impermissibly broaden the "intangible rights" charges contained in the original Indictment. *See United States v. Grady*, 544 F.2d 598, 602 (2d Cir. 1976) (no tolling where second indictment substantially alters first indictment).

[40] With respect to separation from the merits, the parties agreed that the applicable limitations period had long since expired and that the Superseding Indictment would be time-barred but for the "savings clause." There was no conduct on the defendant's part such as flight effectively tolling the statute, nor was there any question of waiver or prejudice, requiring development at trial.

statute of limitations claim was not "effectively unreviewable" under the collateral order doctrine, and hence not immediately appealable. App. A, at 16a. In so holding, the court misapplied this Court's precedents and erroneously declined to exercise jurisdiction.

In *Abney v. United States*, 431 U.S. 651, 660-62 (1977), this Court recognized that deprivation of a right not to be tried satisfies the "effectively unreviewable" requirement under *Cohen*. More recently, in *Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494, 1499 (1989), this Court distinguished between a right not to be tried and a generalized right to be free from prosecution. Addressing the appealability of an order denying a motion to dismiss under Fed. R. Crim. Proc. 6(e), the Court explained that "[a] right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur. . . ." 109 S. Ct. at 1499. The Court then looked to the language of the rule in question to determine whether there was any such guarantee. *Id.*

In this case, the applicable statute expressly states that "no person shall be *prosecuted, tried, or punished* for any offense, not capital, unless the indictment is found or the information is instituted" within the limitations period. 18 U.S.C. § 3282 (emphasis supplied). Thus what Davis asserts here is an explicit statutory

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As for a conclusive determination, the district court ruled on the applicability of the "savings clause," as a matter of statutory construction, and on the scope of the Superseding Indictment relative to the original Indictment. Having done so, the court would have no occasion to revisit Davis' claim in light of the facts emerging at trial. Moreover, inasmuch as the interest at stake here is that of avoiding exposure to trial, as discussed below, the right to an immediate appeal in this case would not necessarily hinge on satisfaction of these two factors. *See Richardson*, 468 U.S. at 321-22 (holding immediately appealable double jeopardy claims even where "separate from the merits" requirement of collateral order doctrine is not met).

right not to be tried, "the . . . practical value of which would be destroyed if it were not vindicated before trial." *United States v. MacDonald*, 435 U.S. 850, 860 (1978) (footnote omitted). As such, his statute of limitations claim is immediately appealable.

This analysis—which focuses on the plain language of the statutory text at issue—follows from this Court's decisions recognizing a right not to be tried in other contexts. For example, an express right not to be prosecuted has been found in the Double Jeopardy Clause, *see Abney*, 431 U.S. at 661 (" 'nor shall any person be subject [for the same offense] to be twice put in jeopardy of life or limb,"), and the Speech or Debate Clause, *see Helstoski v. Meanor*, 442 U.S. 500, 501 n.1 (1979) (" 'for any Speech or Debate in either House, . . . [the Senators and Representatives] shall not be questioned in any other Place' ").[41]

In concluding that Davis' claim is not "effectively unreviewable" after final judgment, the court below ignored this Court's precedent and disregarded the unambiguous language of section 3282.[42] Instead, the court resorted

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[41] Conversely, where the language in question has lacked some guarantee against trial, claims based thereon have been held not immediately appealable. *See, e.g., Midland Asphalt*, 109 S. Ct. at 1499 ("The text of Rule 6(e) contains no hint that a governmental violation of its prescriptions gives rise to a right not to stand trial"); *MacDonald*, 435 U.S. at 861 ("the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' ").

[42] The opinion below does not even mention, let alone apply, *Midland Asphalt*, which had been decided and cited to the court a month before it rendered its decision. As for the statute, the opinion points to the "[e]xcept as otherwise expressly provided by law" language in section 3282, as if to suggest that other provisions somehow vitiate the statute's explicit guarantee that trial will not occur after the statute has run. *See* App. A, at 17a. But the fact that a provision such as the "savings clause" under 18 U.S.C. § 3288 may extend the specified limitations period does not

to general notions of the purposes and policies underlying limitations periods, focusing on prosecutorial fairness and promptness. App. A, at 17a-18a.[43] But a statute of limitations has a dual role: "the statute is not merely a legislative directive of repose but, analogous to the double jeopardy protection, an absolute bar to the sovereign's power to prosecute." *United States v. Levine*, 658 F.2d 113, 119 (3rd Cir. 1981) (footnote omitted). Thus, if a defendant is to "enjoy the full protection of the [statute]," his limitations challenge must be reviewed before he is put through trial a second time. *Abney*, 431 U.S. at 662. The right not to be tried that is encompassed by statutes of limitations in general—and in explicit terms by the statute applicable here—should not be denied merely because it is not the *sole* interest protected by the statute.[44]

The court below relied heavily on the Third Circuit's opinion in *Levine*, 658 F.2d at 113, but that case was decided before *Midland Asphalt* and cannot be reconciled with it, in result or analysis. Contrary to the direction of *Midland Asphalt*, the *Levine* court turned a blind eye to

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change the essential role of the statute in preventing prosecution and trial once the limitations period has finally expired.

[43] The court below also rested its decision on the undisputed, but irrelevant, proposition that there is no generalized protection from trial arising from any error in failing to dismiss an indictment. App. A, at 18a. Davis relies on no such generalized protection, but on the explicit statutory guarantee of section 3282.

[44] Immediate appeal is, at any rate, entirely consistent with the purposes and policies of section 3282. To the extent that a statute of limitations provides repose, a defendant is necessarily deprived of this repose if his appeal must await final judgment. Moreover, to the extent that the effects of time on the quality of evidence and memories are a concern, as this Court has noted, statutes of limitation serve *"to protect individuals from having to defend themselves against charges* when the basic facts may have become obscured by the passage of time." *Toussie v. United States*, 397 U.S. 112, 114-15 (1970) (emphasis added).

the all-important language of section 3282. Instead, the court attached near-dispositive significance to the constitutional—versus—statutory distinction between the Double Jeopardy Clause and statutes of limitations, 658 F.2d at 125-26—a distinction rejected in *Midland Asphalt*'s reference to "an explicit *statutory or constitutional* guarantee that trial will not occur," 109 S. Ct. at 1499 (emphasis added). Nor is the *Levine* court's distinction between a conditional right not to be tried, in the case of a statute of limitations, and an absolute right not to be tried, in the case of double jeopardy, of any avail. *See* 658 F.2d at 126-28. For the double jeopardy right is "absolute" only when the prerequisites for double jeopardy obtain, and the right not to be tried when the conditions of the statute have been satisfied, *i.e.*, expiration of the limitations period, is no less "absolute."

This Court has stated unequivocally that there could be a statutory as well as constitutional right not to be subject to a criminal trial—a right which if denied would be irreparably lost absent an immediate appeal. To date, however, the Court has never been confronted with a statutory right to be free of trial. There could be no clearer statutory grant of such a right than the one at issue here: that "no person shall be prosecuted, *tried*, or punished for any offense" after the relevant period of time has passed. 18 U.S.C. § 3282 (emphasis added). If the judgment below stands, this Court's clear statements on the issue will become so much empty *dicta*. The case at bar provides a valuable opportunity for the Court to render a definitive decision on this important jurisdictional issue.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be granted to review the judgment of the court of appeals.

Respectfully submitted,

ARTHUR F. MATHEWS
Counsel of Record
STEPHEN W. PRESTON
W. HARDY CALLCOTT
CHRISTOPHER J. MELCHER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

JOHN J. CHESTER
CHESTER, HOFFMAN, WILLCOX & SAXBE
17 South High Street
Suite 900
Columbus, Ohio 43215
(614) 221-4000
Counsel for Petitioner
S. Robert Davis

LAURA D. BYRNE
5720 Avery Road
Amlin, Ohio 43002
(614) 889-7941
Of Counsel

July 17, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88-3944

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

S. ROBERT DAVIS,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Ohio

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Decided and Filed April 25, 1989

Before: NELSON and NORRIS, Circuit Judges, and FRIEDMAN, District Judge.*

DAVID A. NELSON, Circuit Judge. Appellant S. Robert Davis was convicted of violating the federal mail fraud statute, 18 U.S.C. § 1341. This court overturned the conviction on the ground that the indictment, which was based on the "intangible rights" theory disavowed by the Supreme Court in *McNally v. United States*, 483

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* The Honorable Bernard A. Friedman, United States District Judge for the Eastern District of Michigan, sitting by designation.

U.S. ——, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), was legally deficient. A superseding indictment was then returned, and Mr. Davis filed two motions to dismiss—one alleging a violation of the Double Jeopardy Clause and the other based on the statute of limitations. Both motions were denied by the district court, and Mr. Davis has taken an interlocutory appeal.

We conclude that we lack jurisdiction to entertain a pretrial appeal from the district court's ruling on the statute of limitations question. With respect to the double jeopardy issue—as to which the government concedes we have jurisdiction under the collateral order exception to the final judgment rule, *Abney v. United States*, 431 U.S. 651 (1977)—we shall affirm the order of the district court.

I

Appellant Davis owned a house and a tract of undeveloped land in the Squirrel Bend section of Upper Arlington, Ohio. He planned to subdivide his vacant land, and the city planned to construct a public waterline in the area at an estimated cost of $80,000. Mr. Davis agreed to provide water and sewer improvements to people who purchased lots from him, and he was expected to pay $60,000 of the city's cost.

After discussions with Harold Hyrne, the city manager of Upper Arlington, Mr. Davis undertook to construct the Squirrel Bend waterline at his own expense. He had the line installed by Wright Brothers Excavating Company at a contract price of $36,296.54.

Under § 903.12 of the Upper Arlington City Code, abutting property owners may "tap in" to a privately built waterline without the builder's consent if they pay the builder a charge set by the city manager on the basis of the builder's certification of "the entire cost of such improvement to the builder." One of Mr. Davis's neighbors, Richard Schultz, paid Davis a tap-in fee set

by City Manager Hyrne on the basis of a $71,472 cost figure allegedly certified by Davis. The United States asserts that the $71,472 figure (which Mr. Davis denies having "certified") was substantially above the actual cost of the improvement to Davis.

A federal grand jury indicted Mr. Davis for mail fraud on June 12, 1986. The theory of the indictment was that Davis had devised "a scheme or artifice to defraud the citizens of the City of Upper Arlington, Ohio, of their rights to honest and faithful services from their public officials," in furtherance of which scheme he had used or caused the use of the United States mails on four occasions between June 18, 1981, and August 13, 1981. It was alleged that City Manager Hyrne—the public official of whose honest and faithful service the townspeople supposedly were deprived—had (1) agreed not to question any waterline construction cost certified by Davis as long as the amount certified was approximately the same as the cost estimated by the city, (2) approved a tap-in charge based on an inflated cost certification, and (3) failed to collect city inspection fees for the waterline. In return, Davis was alleged to have arranged for Hyrne to receive a discount on a purchase of certain common stock.

A pretrial motion to dismiss for failure to allege a legally cognizable scheme to defraud was denied, and the case went to trial before a jury. After seven days of trial and three days of deliberation, the jury returned a verdict of guilty on all four counts. Mr. Davis appealed. While his appeal was pending, the United States Supreme Court decided *McNally v. United States*, *supra*, 483 U.S. ——, holding that the federal mail fraud statute is limited in scope to the protection of tangible property rights and does not make it a crime to deprive citizens of their intangible right to honest performance of duty by public officials. (Congress has now amended the mail fraud statute to incorporate the intangible rights

theory, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (to be codified at 18 U.S.C. § 1346), but the amendment has no retroactive application, of course.) In an unpublished per curiam opinion filed on March 8, 1988, we reversed Mr. Davis's conviction on the ground that the indictment was defective under *McNally*:

> "The indictment in the case at bar does not properly allege a violation of the mail fraud statute. In its initial paragraph the indictment defines the scheme to defraud as one directed at the rights [of the citizens of Upper Arlington] to honest and faithful services from their public officials. . . . Although in later paragraphs the indictment avers facts that may have involved a deprivation of property or money, nowhere is there an averment that the purpose or result of the scheme was to obtain property or money for the defendant. . . . We shall not strain to construe this defective indictment as implicitly charging that the purpose of the scheme was to deprive someone of money, as opposed to depriving the citizens of Upper Arlington of their 'rights to honest and faithful services from their public officials. . . .' "

United States v. Davis, No. 86-4076, slip op. at 3.

On remand, the district court dismissed the indictment. Ten days later a "superseding indictment" was returned against Davis, charging him with four counts of mail fraud based on the same jurisdictional mailings alleged in the original indictment.

The original indictment and its successors are much the same in wording, except for the introductory paragraph of Count 1. Instead of alleging that Davis had devised a scheme to defraud his fellow citizens of their right to good government, the new introductory paragraph (which is incorporated by reference in Counts 2, 3, and 4) alleges that Davis devised "a scheme or artifice

to defraud, and to obtain money by means of false and fraudulent pretenses and representations. . . ." Like the original indictment, the superseding indictment charges that Davis prevailed upon Hyrne to accept a falsely inflated cost figure for the construction of the waterline, to approve an inflated tap-in charge based on that figure, and to refrain from collecting inspection fees, all in return for Davis's arranging for Hyrne to buy stock at a discount. Minor changes tracking the language of the new introductory paragraph specify that the tap-in charges were in the form of "money," and that the inspection fees Hyrne refrained from collecting were likewise monetary in nature.

After entering a plea of not guilty, Davis moved to dismiss the superseding indictment for violation of the Double Jeopardy Clause and for failure to bring the indictment within the five-year period prescribed by the applicable statute of limitations. The district court (Joseph P. Kinneary, J.) denied both motions. This interlocutory appeal followed.

II

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. In the leading case of *United States* v. *Ball*, 163 U.S. 662 (1896), the Supreme Court held that a defendant who succeeded in having his murder conviction set aside because of a legal defect in the indictment was not "twice put in jeopardy," in violation of the Constitution, when retried on a new and legally sufficient indictment. The Court provided no very extensive rationale for this holding, possibly considering it self-evident that the Double Jeopardy Clause was not designed to guarantee the defendant "the right of being hung, to protect him from the danger of a second trial." *United States v. Keen*, 26 F. Cas. 686, 690 (C.C.D. Ind. 1839) (No. 15,510), as quoted in *United States v. Scott*, 437

U.S. 82, 92 (1978). The modern interpretation of *Ball* is that "it effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course." *Price v. Georgia*, 398 U.S. 323, 326 (1970). *Cf. Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308 (1984).

The second Mr. Justice Harlan offered these observations on the "*Ball* principle," as he called it:

> "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest."

United States v. Tateo, 377 U.S. 463, 466 (1964).

The Court has endorsed Justice Harlan's words in a number of subsequent opinions, the most recent of which is *Lockhart v. Nelson*, 488 U.S. ——, 109 S.Ct. ——, 102 L.Ed.2d 265 (1988). See 102 L.Ed.2d at 272, where, before quoting extensively from *Tateo*, the Court cited

both *Ball* and *Tateo* in support of the proposition that "[i]t has long been settled . . . that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside . . . because of some error in the proceedings leading to conviction."

The error committed by the trial court in *Ball*—failure to dismiss a faulty indictment—was characterized in *Burks v. United States*, 437 U.S. 1, 14 (1978), as "trial error," the rectification of which has never been thought to be precluded by the Double Jeopardy Clause: "We have no doubt that *Ball* was correct in allowing a new trial to rectify *trial error* . . . ." *Id.* (emphasis by the Court). In *Scott*, *supra*, 437 U.S. at 89, a case decided the same day as *Burks*, the Court observed that "*Ball* firmly established that a successful appeal of a conviction precludes a subsequent plea of double jeopardy . . . ", and in *Montana v. Hall*, 481 U.S. 400, 404 (1987), the Court cited *Ball* in declaring it to be "clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument."

Generalizing from *Ball* and subsequent decisions, the *Scott* Court went so far as to declare that "[t]he successful appeal of a judgment of conviction, on *any* ground other than the insufficiency of the evidence to support the verdict: . . . poses no bar to further prosecution on the same charge." 437 U.S. at 90-91 (emphasis supplied). We did not reach the sufficiency of the evidence question in Mr. Davis's earlier appeal, and given what the Supreme Court said in *Scott*, it may not be readily apparent how we could properly hold that Mr. Davis's successful appeal on the very ground that was involved in *Ball* —a legal defect in the indictment—poses a bar to further prosecution. If, as *Burks* said, it was "trial error" not to dismiss the defective indictment in *Ball*, it would seem to have been "trial error" for the district court not

to dismiss the initial indictment of Mr. Davis—and a reversal procured on the basis of "trial error," to repeat, does not bar a new trial.

In *Saylor v. Cornelius*, 845 F.2d 1401, 1405 (6th Cir. 1988), we recognized that "the only time a reversal of a conviction is the equivalent of an acquittal as far as the applicability of the Double Jeopardy Clause's bar against retrial is concerned, is where the reversal is based on insufficiency of the evidence." We nonetheless held, in *Saylor*, that where the defendant had been tried on an indictment that embodied two distinct legal theories (guilt by reason of acts performed as an accomplice and guilt by reason of acts performed as a conspirator), one of which theories (conspiracy) proved to be unsupported by the evidence and the other of which was inexplicably ignored in the instructions to the jury, the Double Jeopardy Clause barred a retrial on the uninstructed theory after the judgment entered against the defendant on the other theory had been reversed. The evidence introduced in support of the accomplice theory—the theory omitted in the trial court's charge to the jury—may have been legally sufficient to support a conviction. Because we were prepared to apply the Double Jeopardy Clause in *Saylor* notwithstanding the sufficiency of the evidence supporting the theory on which a retrial was sought, Mr. Davis argues (without conceding the sufficiency of the evidence against him in this case) that we ought to do the same thing here.

If *Saylor* was decided correctly (and Judge Kinneary doubted that it was), Mr. Davis's argument has a certain superficial appeal despite the obvious distinction arising from the fact that our reversal of the Davis conviction turned on the inadequacy of the original indictment, while the reversal of the Saylor conviction had nothing to do with any defect in the indictment. We were concerned in *Saylor* about setting a precedent that would allow a prosecutor to "indict on several counts or theories, present evidence on each of them, and then go to

the jury only on selected ones, in effect holding the others in reserve for a subsequent or improved effort" if the jury should fail to convict on the theory or theories actually submitted to it. 845 F.2d at 1408. Perhaps we ought to be equally concerned about setting a precedent that would allow a prosecutor to obtain an indictment on one theory (defrauding the electorate of an intangible right to honest government, *e.g.*) and let the case go to a jury on that theory, while holding in reserve a second theory (defrauding an identifiable individual of money or property) in order to get a subsequent bite at the apple if the jury failed to convict the first time.

In the factual situation presented here, such a concern would be unwarranted. If the jury had found Mr. Davis innocent of the offense with which he was charged in the original indictment, we do not believe for a moment that he could have been retried for the same offense on the theory embodied in the superseding indictment. The theories are different, to be sure, but there is a necessary logical nexus between them, and the conduct that would have to be proved in order to obtain a conviction would be the same under both indictments. That was not the situation in *Saylor*; in that case we thought there was "no necessary logical nexus between the two theories," and it seems clear from our opinion that if Mr. Saylor had been indicted and tried on one theory only, he might, as we saw it, have been subject to a later trial on the second theory regardless of the outcome of the first trial. 845 F.2d at 1408.

Judge Kinneary emphasized another distinction between this case and *Saylor*: the *Saylor* prosecutor was asleep at the switch (or so we assumed) when he failed to request that the jury be charged on the conspiracy theory, but no comparable fault could be attributed to the *Davis* prosecutor in deciding to base the indictment of Mr. Davis on an "intangible rights" theory alone. That decision was perfectly legitimate when made, the in-

tangible rights theory having been endorsed by this court only weeks before in the very case that was ultimately to produce the *McNally* decision, *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986), *rev'd sub nom. McNally v. United States*, 483 U.S. ——, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). This court has been wrong before, of course, but the prosecutor is not to be faulted for assuming we were right.

The prosecutor gained no unfair advantage by limiting the indictment of Mr. Davis to an intangible rights theory. Had the prosecutor been given the prescience to realize that *Gray* would be reversed in *McNally*, the indictment of Mr. Davis would unquestionably have been drawn differently. As noted above, moreover, if the jury had acquitted Mr. Davis in the trial on the original indictment, there could have been no new trial even if the Supreme Court had affirmed *Gray* in *McNally* instead of reversing it. The potential for prosecutorial abuse that led us to find a termination of jeopardy in *Saylor* simply had no counterpart here.

The defect in the charging instrument at issue in *United States v. Ball*, *supra*, 163 U.S. 662 (a failure to specify the time and place of a murder victim's death), like the defect in the charging instrument in *Montana v. Hall*, *supra* ("the State simply relied on the wrong statute," 481 U.S. at 404), obviously reflected more poorly on the prosecutor than did the defect (as it proved to be) in the instrument with which Mr. Davis was charged. If, as *Saylor* seems to suggest, prosecutorial culpability may have some relevance in determining when jeopardy has been terminated, it would be more than a little anomalous to conclude that although a retrial was not barred in *Ball* or in *Hall*, *Saylor* requires us to block a retrial of Mr. Davis.

Mr. Davis argues that cases such as *Ball* and *Hall* involve the "acquittal equivalent" branch of double jeopardy law, under which the only question is whether the

first trial ended in the functional equivalent of an acquittal. There is a second branch, he argues, that protects against reprosecution even where the first trial did not end in an acquittal or the equivalent of an acquittal. Thus in *Oregon v. Kennedy*, 456 U.S. 667 (1982), where the prosecutor allegedly intended to cause a mistrial, jeopardy would have been terminated, and a retrial would have been barred by the Double Jeopardy Clause, had it been found as a fact that the prosecutor was guilty of misconduct that was intended to provoke the defendant into moving, successfully, for a mistrial. *Oregon* is a specimen of what we might call the "mistrial" branch of double jeopardy law, *cf. United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824); but no mistrial was declared at Mr. Davis's trial, and *Oregon* and its relatives do not apply here. Other cases cited by Mr. Davis are similarly inapposite: *United States v. Wilson*, 420 U.S. 332 (1975), for example, held that a government appeal from a ruling in favor of the defendant after a guilty verdict was not barred by the Double Jeopardy Clause.

It is true that our decision in *Saylor* did not involve an "acquittal equivalent," but the significance of *Saylor* is limited by the unusual situation we were addressing in that case: because of prosecutorial absent-mindedness, Mr. Saylor's trial ended without an acquittal or a conviction on a charge that had been properly presented in an indictment and emphasized at trial. In the present situation, by contrast, the "money or property" theory of mail fraud was omitted from the indictment, and the theory was expressly disavowed at trial. The prosecutor was unequivocal on this, telling the jury

> "This is not a money case. When we talk about fraud, we are not talking about taking too much money from somebody or getting a little bit more money than you otherwise might have, we are talking about a fraud on a governmental process."

In *Saylor* we read *United States v. Scott*, 437 U.S. 82, as saying that trials which end inconclusively may some-

times be placed at one or another of two "poles"—one where trial proceedings are terminated inconclusively as a result of the defendant's election, and the other where the proceedings end inconclusively as a result of the prosecutor's action. At the first pole, reprosecution is allowed; at the second, it is barred by the Double Jeopardy Clause. The inconclusive outcome of the proceedings brought against Mr. Saylor on the accomplice theory fell between the two poles, we thought, but closer to the second than the first. But these poles have no relevance here, as we see it; proceedings against Mr. Davis on a "money or property" theory cannot fairly be said to have "terminated" because of the action or inaction of either party, no such proceedings having been initiated in the first place. This case does not fall between the metaphorical "poles" of *Scott/Saylor*, it is off the map entirely.

Our conclusion that the case at bar is not governed by *Saylor* is strengthened, finally, by what we said in *United States v. Stack*, 853 F.2d 436 (6th Cir. 1988)—a decision handed down three months after *Saylor*. Like the case at bar, *Stack* involved the appeal of a mail fraud conviction obtained on an indictment that proved to have been defective because it included an intangible rights theory. In reversing the conviction in *Stack* we noted, citing *Montana v. Hall*, *supra*, 481 U.S. 400, that "since the conviction is not reversed due to insufficient evidence the government is not precluded from indicting defendant on a permissible theory of mail fraud." 853 F.2d at 438. By the same token, we now hold, the government was not precluded from indicting defendant Davis on a permissible theory of mail fraud.

III

Purporting to forego, in his prior appeal, any claim of what he there characterized as "trial error," [1] Mr.

[1] As noted in the preceding section of this opinion, the Supreme Court said in *Burks*, *supra*, 437 U.S. at 14, that it does constitute

Davis advanced as his first argument in the earlier appeal a contention that "the evidence at trial was insufficient to prove beyond a reasonable doubt the existence of the alleged scheme to defraud." We never reached that issue, and Mr. Davis now contends that our failure to make a specific finding on the sufficiency of the evidence ought to bar any retrial. We are not persuaded.

It is true that in *Delk v. Atkinson*, 665 F.2d 90 (6th Cir. 1981), a habeas corpus case that did not involve a direct appeal from a federal conviction, we observed in a footnote—citing, *inter al.*, *United States v. Orrico*, 599 F.2d 113, 116 (6th Cir. 1979)—that

> "[s]everal courts including this one have indicated that where it is claimed on appeal from a federal conviction that the evidence was insufficient, the reviewing court is required to decide the sufficiency question even though there might be other grounds for reversal which would not preclude retrial." 665 F.2d at 93 n.1.

In neither *Delk* nor *Orrico*, however, was this court dealing with a situation where the defendant had been tried on an indictment incorporating a legal theory that had turned out to be invalid. We faced just such a situation on the earlier appeal here—and it would have been pointless for us to sift through several days' worth of trial evidence to determine whether the evidence would have been sufficient to support a conviction under the "intangible rights" theory if the Supreme Court had not already rejected that theory.

We saw no compelling need, similarly, to decide whether the evidence that was presented under the "intangible rights" theory on which Mr. Davis had in fact been in-

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"trial error," as that term is used in double jeopardy analysis, to let the defendant be tried on a legally deficient indictment. Our reversal of Mr. Davis's conviction was based squarely on the deficiency of the original indictment.

dicted would have been sufficient to support a conviction under the "money or property" theory on which, as we held, he had not been indicted. We could not be certain that the government would ultimately decide to reindict, and considerations of judicial economy counseled in favor of the course we chose to follow even if the case or controversy requirement (U.S. Const., Article III, sec. 2) did not compel it.

But the new indictment is now a fact, and Mr. Davis invites us to decide now, before allowing the second prosecution to proceed, whether the evidence in the first trial would have been sufficient to support a conviction under the second indictment. We decline the invitation. Whether or not the evidence presented earlier would have warranted conviction under a valid indictment, the salient fact is that there was no such indictment earlier—and a valid indictment now having been returned, the government is both obliged and entitled to make its case anew. The government certainly would not be foreclosed, at a trial on the new indictment, from offering evidence that was not tendered at the first trial.

The new trial in this case, like the new trial allowed in a different context by *Justices of Boston Municipal Court v. Lyndon*, *supra*, 466 U.S. 294 (1984), can be regarded as "an enlarged, fact-sensitive part of a single, continuous course of judicial proceedings." *Id.* at 309, quoting the court of appeals dissent of Campbell, J., 698 F.2d 1, 12 (1st Cir. 1982). The proper time for determining the sufficiency of the evidence on the "money or property" theory embodied in the new indictment in the case at bar will come when the government has rested its case in the "enlarged, fact-sensitive" part of the proceedings against Mr. Davis. And the proper court to make the sufficiency determination, in the first instance, will be the court that hears the evidence.

If we are wrong in thinking it inappropriate for us to try to pass on the sufficiency of the evidence at this

juncture, perhaps it is enough to say that we do not think the case presented by the government at the first trial would have been frivolous under a "money or property" indictment. Our initial impression (which is not to be deemed binding on the trial court) is that whether the $71,472 figure furnished to the city manager was intended to be a certification of Mr. Davis's cost is a question of fact for the jury, and not a question for the court. What cost Mr. Davis actually incurred would likewise seem to be a question of fact—and it may prove to be a somewhat complex one, inviting expert testimony from both sides. Superficially, at least, the fact that Mr. Davis paid Wright Brothers Excavating Company only $36,297 for installing a line that may have been certified as costing Mr. Davis almost twice that amount suggests that the government was not way out in left field on this issue.

Citing a United States Attorneys' manual, Mr. Davis tells us that "[t]his case hardly rises to the usual level of federal concern embraced by the Department of Justice's published policies governing the exercise of discretion in the pursuit of mail fraud prosecutions. . . ." That may be so, but there has been no showing here of any abuse of prosecutorial discretion of the sort claimed in *United States v. Adams*, —— F.2d —— (6th Cir. 1989). The government seems to have a colorable case, and we know of no reason why it may not bring it to trial, under a legally sufficient indictment, if it chooses to do so.

IV

The statutory limitations period for mail fraud prosecution is five years. 18 U.S.C. § 3282. Allowing for the tolling of the statute while the first indictment was in effect, Mr. Davis contends that the second indictment in this case was returned five years and ten days after the last of the four mailings on which the prosecution is based. The government maintains that the new indict-

ment was timely under 18 U.S.C. § 3288, a savings statute that permits a new indictment to be returned within six months of the dismissal of an indictment which, after the statute of limitations has run, "is dismissed for any error, defect, or irregularity with respect to the grand jury. . . ." Mr. Davis reads the savings statute as applying only where the indictment is dismissed for error of a sort that did not occur here, and he says that the new indictment broadened the charges impermissibly in any event. The government reads the savings statute as applying where the indictment is found defective or insufficient for any cause, and the government denies that the new indictment is impermissibly broad. In denying Mr. Davis's motion to dismiss the new indictment on statute of limitations grounds, the district court sided with the government. We shall not resolve the dispute here, because we are satisfied that we have no jurisdiction to do so in an interlocutory appeal.

Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), and its progeny created a "collateral order" exception to the rule that only final judgments are appealable. To be appealable under the exception, the order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Bauer v. Commerce Union Bank*, 859 F.2d 438, 440 (6th Cir. 1988), *cert. denied*, —— U.S. ——, 57 U.S.L.W. 3613 (1989).

Whether or not it "conclusively" determined the disputed question, the ruling that the statute of limitations did not bar the reprosecution was at least separate from the merits of the action. It did not, however, satisfy the third element of *Cohen*, which requires that the order be effectively unreviewable on appeal from a final judgment.

Mr. Davis suggests, in this connection, that he will irretrievably lose his right to be free from a costly, un-

necessary, and inconvenient second trial if he has to wait until after a conviction to obtain an appellate determination as to whether the reprosecution was untimely. But defendants in criminal proceedings often find themselves in comparable situations, and we are not convinced that Mr. Davis possesses any right arising from the Constitution or from a statute that will be irretrievably lost if we wait to decide the statute of limitations question until the conviction—if there is a conviction—is appealed.

Mr. Davis argues that his right to be free from an untimely prosecution is guaranteed by the words of the statute of limitations, 18 U.S.C. § 3282: "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." Davis omits an introductory clause, however: "Except as otherwise expressly provided by law. . . ." Read in its entirety, the statute of limitations seems to have been designed for a somewhat different purpose than the Double Jeopardy Clause. The Double Jeopardy Clause protects one against wrongly being tried or "placed in jeopardy," but statutes of limitations, as the Third Circuit noted in an exhaustive discussion of this question, "acknowledge the state's right to try certain persons, but then set boundaries on the exercise of that power." *United States v. Levine*, 658 F.2d 113, 127 (3d Cir. 1981).

> "Limitations statutes . . . are intended to foreclose the potential for *inaccuracy* and *unfairness* that stale evidence and dull memories may occasion in an unduly delayed trial. They provide relief from extended pretrial anxieties and, by encouraging investigation of recent crimes, contribute to a rational allocation of prosecutorial resources. . . . [I]t is primarily concerns of prosecutorial fairness and promptness, in contradistinction to insulation from repeated trials,

> that underlie limitations statutes. Consequently, pretrial review is neither critical nor always helpful in securing these interests." (Emphasis in original.)

Id. As the *Levine* opinion says, the purpose that a statute of limitations is supposed to serve resembles the purpose of the Speedy Trial Clause of the Constitution. And in *United States v. MacDonald*, 435 U.S. 850 (1978), the Supreme Court held that denial of a pretrial motion to dismiss a criminal prosecution on speedy trial grounds is not an appealable interlocutory order under *Cohen*. "Unlike the protection afforded by the Double Jeopardy Clause," Justice Blackmun wrote, "the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all." *Id.* at 861.

Courts have repeatedly held in other contexts that no generalized right exists to be free from prosecution—no such right, at least, as would create a corresponding right to an interlocutory appeal. See, for example, *EEOC v. American Express Co.*, 558 F.2d 102 (2d Cir. 1977), where the Court of Appeals for the Second Circuit rejected a claim of immediate appealability as to a district court ruling that the EEOC could maintain a discrimination suit notwithstanding that the same issue had been litigated, and lost, in a prior private action:

> "Amex here does not claim that its right to proceed in another forum will be irretrievably lost, but rather that it should not have to litigate at all and thus save the expense and time involved in this suit in the district court. But that is true of all denials of motions to dismiss complaints. The defendant is compelled to try the cause on the merits, but by the same token the Court of Appeals is spared the problem of hearing piecemeal litigation."

Id. at 104. See also *Parr v. United States*, 351 U.S. 513, 519-20 (1955) ("bearing the discomfiture and cost of a

prosecution for crime even by an innocent person is one of the painful obligations of citizenship").

In addition to filing his notice of appeal, Mr. Davis has petitioned this court for issuance of a writ of mandamus that would direct Judge Kinneary to dismiss the superseding indictment. The petition was filed as a "precaution," to give us a jurisdictional basis for deciding the statute of limitations issue even if we should conclude that it does not fall within the collateral order exception of *Cohen*. Having so concluded, however, we do not agree that "precautionary" jurisdiction can be conferred. If it were that easy to get an appellate court to review a pretrial order, the final judgment rule would simply be eviscerated.

Mandamus is an "extraordinary" remedy, and may be granted only in "exceptional circumstances, amounting to a judicial usurpation of power." *Warden, Kentucky State Penitentiary v. Gall*, 865 F.2d 786, 788 (6th Cir. 1989), quoting *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Mandamus ought not be "resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record." *Roche v. Evaporated Milk Association*, 319 U.S. 21, 27-28 (1943). *Cf. Vickers Motors, Inc. v. Wellford*, 502 F.2d 967, 968 (6th Cir. 1974) (Mandamus "should not issue as a substitute for appeal to review interlocutory orders that do not deprive 'the parties of a trial before the court on the basic issues involved in the litigation.' ") Any other conclusion would "thwart the Congressional policy against piecemeal appeals in criminal cases." *Roche*, 319 U.S. at 30; *Will v. United States*, 389 U.S. 90, 96 (1967).

The petition for a writ of mandamus is DENIED, and the order of the district court declining to dismiss the case on double jeopardy grounds is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

Case No. CR-2-88-063

UNITED STATES OF AMERICA,
Plaintiff,

v.

S. ROBERT DAVIS,
Defendant.

OPINION AND ORDER

[Filed Oct. 12, 1988]

This matter comes before the Court to consider the various motions of the defendant, S. Robert Davis, and the government's responses thereto.

On October 6, 1986, a jury convicted S. Robert Davis for mail fraud, 18 U.S.C. § 1341 (1982), in connection with an alleged scheme with the city manager of Upper Arlington, Harold Hyrne, to inflate the cost of a waterline installed in the Squirrel Bend subdivision. According to the Indictment, Hyrne then passed on the inflated charges to property owners who wished to "tap-in" to the waterline.

The first indictment charged Davis with "mail fraud": he allegedly defrauded the citizens of Upper Arlington "of their rights to honest and faithful services from their public officials." Indictment, at 1. After a jury convicted Davis for charges in the Indictment, however, the Supreme Court rejected this "intangible rights"

theory of mail fraud. *United States v. McNally*, 107 S. Ct. 2875 (1987). According to *McNally*, the statute only concerns the deprivation of "money or property."

In following *McNally*, the Court of Appeals reversed Davis' conviction. *United States v. Davis*, No. CR-2-86-063 (6th Cir. Mar. 8, 1988). The government then reindicted Davis under the proper theory of mail fraud, stating that he had devised a "scheme or artifice to defraud, and to obtain money by means of false and fraudulent pretenses and representations." Superseding Indictment, at 1.

Before going to trial on the charges in the Superseding Indictment, the defendant filed various pretrial motions. The Court will address each in turn.

I.

First, the defendant moves for leave to file reply memoranda before the Court considers two of the defendant's motions now before the Court. This Court's pretrial order stated clearly, "Reply briefs will not be filed." *United States v. Davis*, No. CR-2-86-063, at 2 (S.D. Ohio July 15, 1988) (pretrial order).

The defendant correctly notes that he does raise "complex and novel questions" in his motions. Motion for Leave to File Reply Memoranda. Despite these complexities, however, the Court finds that the defendant had an adequate opportunity to address the issues he raised and finds that rebuttals are not necessary. Accordingly, the defendant's Motion for Leave to File Reply Memoranda is DENIED.

II.

Second, the defendant moves the Court for a hearing on some of the motions considered herein. Although these motions "implicate fundamental constitutional rights," the Court finds that the written memoranda adequately apprise it of the issues involved and that oral argument

on these motions would be unnecessary for a "just resolution of this case." Motion for a Hearing on Certain Motions, at 2. Thus, the defendant's motion is DENIED.

III.

Third, the defendant moves for dismissal of the Superseding Indictment because this action violates the Double Jeopardy Clause. The first indictment charges Davis with defrauding the citizens of Upper Arlington "of their rights to honest and faithful services from their public officials." Indictment, at 1. After the Court of Appeals reversed the defendant's conviction, however, the government reindicted Davis, charging him with devising a fraudulent scheme to obtain money. Davis claims that this second action violated the defendant's rights under the Double Jeopardy Clause.

The Double Jeopardy Clause provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The purpose of the Double Jeopardy Clause is to preclude the state from making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he will be found guilty." *Green v. United States*, 355 U.S. 184, 187-88 (1957).

The defendant argues that when the government presents an invalid theory of liability to the jury, a failing for which the government is responsible, any conviction would not constitute a verdict on the relevant, viable theory of liability. That is, the first trial ends without a verdict on the proper theory. A retrial on the charge under the proper theory, the defendant argues, would be a violation of the Double Jeopardy Clause. *See Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988).

Here, the defendant claims that since the government presented the jury with the "intangible rights" theory and not the "money or property" theory, the jury's conviction was not under the correct theory. As far as the "money or property" theory is concerned, then, the jury neither acquitted nor convicted Davis. The defendant argues that the government could have pursued both theories, but chose to pursue this action under the "intangible rights" theory. Davis concludes that the government is responsible for the "aborted outcome," *id.* at 1407, and therefore it effectively terminated Davis' liability, *see id.* at 1408. Having chosen to present the wrong theory, the argument goes, the government is not entitled to a second chance to convict. *See id.* at 1409.

The government counters by claiming that the Sixth Circuit has already held that the government may retry, under the "money or property" theory of mail fraud, a defendant whom the government originally indicted under the "intangible rights" theory. *See United States v. Stack*, 853 F.2d 436, 438 (6th Cir. 1988). Like the case at bar, *Stack* reversed a defendant's mail fraud convictions because the government relied on the invalid "intangible rights" theory. The court noted, though, "that since the conviction is not reversed due to insufficient evidence the government is not precluded from indicting defendant on a permissible theory of mail fraud." *Id.* (citing *Montana v. Hall*, 107 S. Ct. 1825, 1826-27 (1987)).

On the face of it, *Stack* addresses the very issue now before the Court: whether the government may retry a defendant, convicted under the "intangible rights" theory of mail fraud, under a "money or property" theory. Thus, the procedural posture of *Stack* more closely resembles the case at bar than *Saylor* and thus is highly persuasive.[1] This language, however, is *dicta*. The

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[1] The defendant might claim certain distinctions between *Stack* and the case at bar. First, the defendant could argue that the

parties had not placed the double jeopardy issue before the court and the decision merely reversed the convictions under the "intangible rights" theory. Thus, the *Stack* language is not controlling. The Court must therefore "go back to the basic principles of double jeopardy law to attempt a resolution." *Saylor*, 845 F.2d at 1405.

A. *Traditional Analysis of Double Jeopardy Law*

Under traditional double jeopardy doctrine, the courts have noted the potential unconstitutionality of trying a defendant after an appellate court has reversed a conviction. They established a dichotomy between retrials after the appellate court reversed for an insufficiency of

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Stack court was not faced with a contention that the evidence before it was insufficient, while here, the defendant did challenge the evidentiary sufficiency. Under traditional double jeopardy doctrine, as long as an appellate court reverses for any reason except for evidentiary insufficiency, which includes the possibility that the court might not reach the question, reindictment is permissible. *See infra* notes 2-7 and accompanying text.

It is not whether the parties raised the sufficiency question that counts, then, but rather whether the Court of Appeals relied on the issue to reverse the conviction. Under *Stack* and this case, the court of appeals reversed for reasons other than insufficient evidence; thus, under traditional doctrine, the government may file a new indictment.

Second, the defendant might claim that the crucial distinction is whether the court dismissed the faulty indictment. In *Stack*, the court did not dismiss the flawed indictment, but here, this Court did dismiss. Jeopardy terminated here, the argument goes, after the dismissal.

The crucial question of when jeopardy terminates, however, does not turn on such a formalistic distinction as that between cases in which the court dismissed the indictment and those where it did not. The dismissal of an indictment does not bar a second indictment automatically. Indeed the Supreme Court has permitted reindictments after a court has dismissed the first indictment. *See Montana v. Hall*, 107 S. Ct. 1825 (1987); *United States v. Ewell*, 383 U.S. 116 (1966); *United States v. Ball*, 163 U.S. 662 (1896).

the evidence on one hand and for other kinds of reversals.[2] Reversals in the first category, insufficiency of the evidence, are the equivalent of an acquittal, and the Double Jeopardy Clause bars a second trial.

A reversal of a conviction for any other reason besides insufficiency, however, does not bar a retrial of the defendant.[3] Significantly, the courts place this second category of reversals under the general rubric of "trial error." *See Burks v. United States*, 437 U.S. 1, 14 & n.8 (1978).

The *Burks* Court lists examples of "trial error." The Court noted that in *Hopt v. Utah*, 120 U.S. 430 (1887), trial error justifying reversal consisted of "improper instruction, . . . absence of the accused during a portion of the trial, improper hearsay testimony received, . . . and inadequate record due to failure to record jury instructions." *Id.* at 14 n.8.

Also, the Court noted that the reversal in *United States v. Ball*, 163 U.S. 662 (1896) was for trial error. The Court had reversed the convictions of two alleged mur-

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[2] The *Saylor* court acknowledged that "it is . . . axiomatic that the only time a reversal of a conviction is the equivalent of an acquittal as far as the applicability of the Double Jeopardy Clause's bar against retrial is concerned, is where the reversal is based on insufficiency of the evidence." *Saylor v. Cornelius*, 845 F.2d 1401, 1405 (6th Cir. 1988) (citing *Burks v. United States*, 437 U.S. 1 (1978)).

[3] "Double jeopardy principles do not bar a retrial if a conviction is reversed because of error at the trial if the evidence was sufficient to support the verdict." 2 Wright, *Federal Practice and Procedure* § 470, at 679 (1982). For "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969). "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant." *Burks v. United States*, 437 U.S. 1, 15 (1978).

derers on the grounds of fatal errors in the indictment. To wit, the trial error committed was a "failure to dismiss a faulty indictment." *Burks*, 437 U.S. at 14.

Applying the traditional double jeopardy analysis, the government would prevail. The double jeopardy bar applies only if the reversal is for insufficiency of the evidence. Here, the reversal was not for evidentiary insufficiency. The Court of Appeals did not reach the sufficiency question. *See United States v. Davis*, No. CR-2-86-063 (6th Cir. Mar. 8, 1988).[4] Rather, this Court's failure to dismiss the indictment would be a "trial error." Therefore, it follows that the Double Jeopardy Clause does not bar reprosecution.

On analogous case is *United States v. Ewell*, 383 U.S. 116 (1966), where a district court dismissed a defective indictment after the defendants had pleaded guilty. The court of appeals previously had ruled, in an unrelated case, that indictments under the relevant law, which prohibited the sale of narcotics without the proper form,[5] should include the name of the purchaser, which the first indictment did not.

The government filed a second indictment under the same law and, in addition, alleged violations of a law

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[4] In reversing the conviction, the court simply did not reach the question of evidentiary sufficiency. The court merely reversed on the grounds of insufficiency of the "intangible rights" theory. This holding does not require the court to assume that the Sixth Circuit implicitly reached the sufficiency question and ruled in favor of the government. Nor is it now necessary to for this Court to hold a mini-appeal to decide whether the evidence was sufficient.

The traditional analysis merely looks to the basis of the reversal announced by the appellate court. If the appeals court reversed for any reason besides evidentiary insufficiency, reindictment is permissible. Here, the Sixth Circuit reversed due to the inadequacy of the "intangible rights" theory, not insufficiency of the evidence. Therefore, the traditional analysis would permit reindictment.

[5] 26 U.S.C. § 4705(a) (1964) (repealed 1970).

prohibiting sales of narcotics without the original stamped package.[6] The Court held that the government could prosecute under either statute alleged in the corrected indictment.

The *Ewell* Court relied in its reasoning on *United States v. Ball*, 163 U.S. 662 (1896), which is also analogous to this case. In *Ball*, a murder indictment was fatally defective because it failed to allege the time and place that the victim had died. The Court had earlier reversed the convictions of the defendants and the lower court had dismissed the indictment. The Court held that the defendants could be tried again under a new indictment.[7]

B. *The* Saylor *Court's Departure from the Traditional Analysis*

Saylor v. Cornelius, 845 F.2d 1401 (6th Cir. 1988), departs from the traditional double jeopardy analysis. The traditional analysis permits retrial after convictions if the court of appeals reversed for any grounds except evidentiary insufficiency. The Supreme Court has reasoned that "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969). The Court refers to the broad category of reversals not due to insufficiencies as "trial error."

Saylor, however, narrows the concept of "trial error" to only those cases reversed on grounds of a "procedural error,"[8] despite the Supreme Court's broad definition,

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[6] 26 U.S.C. § 4704(a) (1964) (repealed 1970).

[7] "[A] defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted." *Id.* at 672, *quoted with approval in Burks v. United States*, 437 U.S. 1, 13 (1978).

[8] At one point, *Saylor* refers to the general concept of "trial error" by calling it "instructional error." "[T]his is not a stand-

see Burks, 437 U.S. at 14. Having narrowed the "trial error" concept, the *Saylor* court created the new category of errors, non-procedural mistakes not arising from insufficient evidence. This category would include errors stemming from the submission of the incorrect theory of liability to the jury. For these cases, the court crafted a new test; a reversal of a conviction under *Saylor*, then, does not necessarily wipe the slate clean.

In *Saylor*, the prosecutor charged the defendant with murder. The prosecutor failed to prompt the judge to charge the jury with the proper theory of murder, accomplice liability, and acquiesced in the charge of conspiracy liability, for which there was no evidence. Since the judge charged the jury with the wrong theory, the court reasoned that the proper theory was not before the jury. Therefore, the trial ended "without either an explicit conviction or an explicit acquittal." *Saylor*, 845 F.2d at 1406.

Saylor abandons the traditional rule that any reversal besides insufficiency of the evidence is not the equivalent of an acquittal. Instead, when a trial is "aborted" in this way, *Saylor* states that the court's task is to determine whether the termination was a result of "the defendant's deliberate election" or "as a result of the prosecution's action." *Id.* at 1407.

If the defendant is responsible for the failure to submit the proper theory to the jury, then the Double Jeopardy Clause does not preclude reprosecution. *Id.* On the other hand, where the prosecution is at fault in the omission of the proper theory from the jury instructions, then the Double Jeopardy Clause bars a new trial. For this analy-

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ard 'instructional error' case . . . . In 'instructional error' cases we know that the jury thought there was sufficient evidence to convict *on the offense charged* because the jury returned a guilty verdict." *Id.* at 1404. In the same paragraph, the court went on to call this catchall category "procedural error": "However, due to a procedural error, the defendant is entitled to a retrial." *Id.*

sis, the court relied upon *United States v. Scott*, 437 U.S. 82 (1978).

This Court is skeptical whether the *Saylor* court was justified in relying on *United States v. Scott* for the creation of its new test and its new category of trial errors. First, *Scott* concerned the question of whether the government could appeal two theories of liability dismissed by the district court for prejudicial preindictment delay after an acquittal. *Saylor*, however, concerned a reindictment after the successful appeal from a conviction. *Scott* noted that the body of case authority relevant to reindictments after reversed convictions is entirely separate from that germane to government appeals from acquittals. *Scott*, 437 U.S. at 82.[9] Therefore, *Scott* would not be controlling in a case like *Saylor*, nor would it provide good authority for the *Saylor* test.[10] *Scott* addresses only the situation of mid-trial termination of the proceedings in a manner favorable to the defendant. *See id.* at 100-01.

Second, the distinction between an appeal from an acquittal and a new trial after the successful appeal of a conviction casts doubt on the *Saylor* test. In cases where the proper theory was not before the jury, *Saylor* would not distinguish between juries that convict and those that acquit on the charges before them. The *Saylor* court would merely inquire into the cause of the withholding, the defendant's decision or the prosecution's neglect. Yet the Supreme Court may not ratify the *Saylor* court's identical treatment of acquittals and convictions, for "the

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[9] "Although *Ball* firmly establishes that a successful appeal of a conviction precludes a subsequent plea of double jeopardy, the opinion shed no light on whether a judgment of acquittal could be reversed on appeal consistently with the Double Jeopardy Clause." *Id.*

[10] The statutory law governing government appeals in criminal cases complicated the resolution of cases concerning government appeals and further served to insulate such cases from those involving reindictments after reversed convictions. *See id.*

law attaches particular significance to an acquittal." *Scott*, 437 U.S. at 91.

Scott explained the importance of the distinction between acquittals and convictions for the purpose of double jeopardy doctrine. "To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" *Id.* (citation omitted). "On the other hand, to require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *Id.*

That is, the Supreme Court places a greater burden on the government when it attempts to appeal an acquittal than when it wants to retry the defendant after an appellate court reverses a conviction. *See id.* The defendant, by contrast, has the greater burden in resisting reindictment after a reversed conviction than in preventing an appeal of an acquittal. The *Saylor* court, however, blurs this distinction and crafts a test which does not account for these different burdens placed on the parties.

Indeed, the *Saylor* court's main concern seemed to be that a prosecutor could manipulate the trial process by indicting on several theories, introducing evidence on each, and then presenting only selected ones to the jury. The prosecution could hold the other theories "in reserve for a subsequent or improved effort." *Saylor*, 845 F.2d at 1408. That is, the court was afraid that a defendant could be retried "no matter what the outcome on the court that was charged." *Id.* This proposition is incorrect and the court's fear is simply unfounded. Again, if the defendant secured an acquittal on the theory charged, or if the government procured an unreversed conviction, the Double Jeopardy Clause would bar a new trial for

another offense arising out of the same transaction. *See United States v. Ewell*, 383 U.S. 116, 124 (1966). If the defendant were convicted and the appeals court reversed, though, the traditional analysis would permit reindictment.[11]

Finally, *Saylor* seems to read the *Scott* Court's discussion of the factors which permit appeal of a dismissal as impliedly limiting the ability of the government to retry after the reversal of a conviction. *Scott* bolstered its argument, that the government may appeal the dismissal of two counts for preindictment delay, by noting that the government was willing to place the evidence before the jury, but that the defendant successfully prevented submission for a legal reason unrelated to guilt or innocence. These factors were a *sufficient* condition for renewed government action, an appeal. *Saylor*, however, reads these factors to be *necessary* conditions for renewed action, which does not follow at all.

That is, just because the government may appeal after a mid-trial termination if the defendant was responsible,[12] it does not follow that the government may not retry the defendant if the government is responsible for aborting the proceedings. *Scott*, then, was not a case which limited the government's right to retry a defendant, but rather it expanded the unambiguous scope of the government's right to appeal certain trial court decisions.

It was the *Saylor* court that made the inferential leap from allowing an appeal where the defendant terminated the trial to prohibiting a retrial where the prosecutor was

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[11] In rejecting the defendant's double jeopardy claim, the *Ewell* court stated, "Here the Government is not attempting to prosecute a defendant for an allegedly different offense in the face of an acquittal or an unreversed conviction for another offense arising out of the same transaction." *Id.*

[12] More accurately, the government may appeal a mid-trial termination if and only if the termination was not for insufficiency of the evidence.

negligent. *Saylor* crafted this new test, then, without any real support from *Scott*. Nonetheless, this case is controlling authority in the Sixth Circuit. Despite this Court's misgivings with the *Saylor* test, then, the consideration of double jeopardy here must turn on application of this test to the case at bar.

C. *Application of the* Saylor *Test*

The *Saylor* test requires the Court to determine whether the trial was "aborted as a result of the defendant's deliberate election" or "as a result of the prosecution's action." *Saylor v. Cornelius*, 845 F.2d 1401, 1407 (6th Cir. 1988). In *Saylor*, the prosecution did not object when the judge charged the jury only with conspiracy liability, but not accomplice liability. The prosecution was aware of the problem since the defendant had raised the lack of conspiracy evidence when he objected to the instructions.

The court drew an analogy between the prosecution's "poor preparation" and "illegitimate prosecutorial behavior." *Id.* at 1408. The prosecutor's conduct was "in error" and the failure to object to the erroneous jury instructions was "a fit of absentmindedness." *Id.* This negligence terminated Saylor's liability.

Here, however, the Court does not find that the prosecution's omission of the "money or property" theory from the indictment rose to the level of "poor preparation" or "a fit of absentmindedness." Although the government intentionally chose the "intangible rights" theory and could have advanced both theories, it was relying on the case law controlling at that time which supported actions under the "intangible rights" theory alone. *See United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986), *rev'd sub nom. McNally v. United States*, 107 S. Ct. 2875 (1987).

It was only after the Supreme Court rejected the theory that the Sixth Circuit could say in retrospect that the government had submitted an invalid theory to the jury.

The invalidation of the government's theory was retroactive, and therefore the court cannot charge the government with the knowledge that the "intangible rights" theory was invalid. This Court simply cannot fault the government for failing to prognosticate accurately Supreme Court decisions.

Although in retrospect, the government's reliance on the "intangible rights" theory was "in error," because the Supreme Court rejected the theory, this Court cannot find therefore that the government's reliance on a theory then supported by the case law was negligence. Nor is the omission sufficiently serious to warrant attaching "fault" to the prosecution and barring a second trial.

Thus, the best characterization of this case is that neither party was at fault. The government is not at fault when it relied on then-current case law to submit the "intangible rights" theory to the jury; and the defendant is not at fault since he did not take action to prevent the government from presenting the "money or property" theory. If anyone is at "fault," the real responsibility lies with the Supreme Court for repudiating the "intangible rights" theory.

The defendant might argue, though, that *Saylor* requires the Court to assign fault to one of the parties; there would be no situation where both government and defendant are without fault. The *Saylor* court, however, never made this claim. In *Saylor*, the court assigned fault to the prosecution for permitting the judge to charge the jury with the unsupported conspiracy liability theory, knowing that the evidence showed only accomplice liability. The court was silent, however, as to the proper result when neither party was at fault.

This Court must therefore determine whether the Double Jeopardy Clause bars reindictment when an appeals court reverses the defendant's conviction due to a change in the controlling case law. In making this decision, the

distinction between appeals from acquittals and reindictments after a reversed conviction is helpful. Under traditional analysis, the defendant has a greater burden in preventing reindictment than in resisting an appeal and reindictment would be permissible. Accordingly, the Court holds that the defendant should bear the burden of a change in case authority after a reversed conviction, despite *Saylor*.

In conclusion, the Double Jeopardy Clause does not bar a trial of Davis. Under traditional double jeopardy analysis, the reversal of the defendant's conviction does not result in an acquittal unless an appeals court reverses for insufficient evidence, which is not the case here. And under a *Saylor* analysis, the Double Jeopardy Clause bars a second trial if the prosecutor was negligent in failing to submit the proper theory to the jury. Here, though, the government's failure to present the "money or property" theory stems in large part from its reliance on the then-controlling case law permitting the intangible rights theory. Given the history of the Supreme Court's traditional permissive posture in allowing retrials after reversals of convictions not due to evidentiary insufficiency, the defendant should bear the burden of a change of controlling case law which retroactively invalidates the theory which came before the jury.

The Court, then, finds the defendant's Motion to Dismiss the Superseding Indictment for Violations of the Double Jeopardy Clause to be without merit, and it is, therefore, DENIED.

IV.

Fourth, the defendant moves for dismissal of the Superseding Indictment, arguing that the statute of limitations bars the action against him. During the pendency of the first indictment, the statute of limitations was tolled. When the Court dismissed the Indictment on June 27, 1988, however, the statute of limitations would

have run, unless the government can show that the "saving statute" applies, 18 U.S.C. § 3288 (1982).

Section 3288 provides:

> Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations.

Section 3288 would preclude application of the statute of limitations to this case since the grand jury returned the Superseding Indictment on July 7, 1988, ten days after the Court dismissed the Indictment and thus within the six months period provided by this statute.

The defendant argues that section 3288 is not applicable for three reasons. First, "the original Indictment was not dismissed 'for any error, defect, or irregularity with respect to the grand jury,'" Motion to Dismiss Based Upon Expiration of the Applicable Five-Year Statute of Limitations, at 2. Davis argues that section 3288 is available only when a court dismisses for one of these grand jury defects. Second, "the charges in the Superseding Indictment contain too substantial a variance from the 'intangible rights' fraud theory charged in the original Indictment to fall within the umbra of the 'saving statute.'" *Id.* Finally, the defendant argues that section 3288 "must be strictly construed against the gov-

ernment and in favor of defendant Davis pursuant to the federal 'rule of lenity.'" *Id.* Therefore, section 3288 "does not apply to reindictment for the same offense pursuant to a new scheme or theory after a verdict reached following a full jury trial pursuant to a different scheme or theory." *Id.*

The defendant's first claim is partially correct: the Court did not dismiss the original Indictment for any error, defect, or irregularity with respect to the grand jury. The government admits as much, but does not rely on this portion of section 3288 to support their argument that the statute applies. Instead, the government relies on the language stating that section 3288 allows for a six month extension whenever "an indictment . . . is found otherwise defective or insufficient for any cause." Thus, the defendant's statement, although accurate, cannot defeat application of this statute altogether.

The defendant is not correct, moreover, in arguing that section 3288 is available *only if* the dismissal involves irregularities or defects in the grand jury. As stated above, the government relies on the second clause of section 3288, which permits an extension where the indictment is "otherwise defective or insufficient for any cause." Davis argues that this second clause refers to technical errors referring only to grand juries. In support, the defendant invokes the general rule of *esjudem generis*, arguing that the Court should construe the general words "otherwise defective" and "insufficient for any cause" in the second clause as embracing the kind of flaws enumerated by the proceeding specific first clause, to wit, grand jury defects.

Such a construction renders this phrase superfluous; having already covered grand jury irregularities in the first clause,[13] if the words, "defective" and "insufficient"

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[13] The first clause provides: "Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury." § 3288.

refer again only to grand juries, they would add nothing to the first clause. In statutory construction, the Court must strive to give effect to each phrase and avoid constructions that render statutory language superfluous. *See, e.g., Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). Thus, the Court holds that the second clause allows return of a new indictment for reasons other than grand jury defects. *United States v. Charnay*, 537 F.2d 341, 355 (9th Cir.), *cert. denied*, 429 U.S. 1000 (1976).[14]

The second argument concerns the government's change of theory from one based on the deprivation of "intangible rights" to one grounded on a scheme to gain "money or property." The defendant claims that the Superseding Indictment broadens the charges contained in the Indictment to such an extent that an application of section 3288 would be unfair to the defendant.

The Court, however, finds that the Superseding Indictment did not impermissibly amend the Indictment. As the government correctly notes, the major change of the Superseding Indictment is to delete the "intangible rights" language and replace it by a formulation preferred by the Court in *United States v. McNally*, 107 S. Ct. 2875 (1987). The Superseding Indictment charges the same acts and offenses charged in the Indictment and differs only in the legal theory stated and in the clarificatory language of the Superseding Indictment, explaining that the scheme was for the collection of money.

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[14] The *Charnay* court stated:

> "We conclude from the language of § 3288, as well as from the section's history, that a second indictment may properly be returned within the prescribed six-months period where the dismissal is due to a legal defect, as well as in those cases where the dismissal results from defects or irregularities in the grand jury."

Id.

In short, "a reading of the two indictments shows that essentially the same facts were used to charge almost identical offenses." *Charnay*, 537 F.2d at 354. Although the government had to abandon the intangible rights theory, it does not follow that a simple of change of theory automatically bars reindictment. "Allowing a second indictment to remedy legal deficiencies present in the first is the very purpose for which section 3288 was enacted." *Id.*

Finally, the defendant argues that the saving statute should not apply after a jury trial on the original indictment. The Court holds, however, that section 3288 applies whether the grand jury presents the Superseding Indictment before or after the trial. The plain language of the statute does not distinguish between reindictments before or after trial or between types of dismissals; and the legislative history is silent as to a distinction between pre- and post-trial reindictments.[15] *See generally* S. Rep. No. 1414, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S. Code Cong. & Admin. News 3258-60. Absent a textual warrant for making such a distinction, then, the court cannot dismiss the indictment.

The defendant's motion to dismiss based upon expiration of the applicable five-year statute of limitations is therefore meritless, and is DENIED.

V.

Fifth, the defendant moves to dismiss the Superseding Indictment because the government failed to allege false and fraudulent mailings. The defendant states that since the jurisdictional mailings were required by law, the government must allege that the mailings themselves were false and fraudulent. The defendant attempts to show that the tapping charges, assessed and collected through the use of the mails, were fair and reasonable,

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[15] Given the clarity of the statute, the rule of lenity does not apply here.

and only applied to three of the victim's many acres of land. The defendant argues that since the charges were "fair and reasonable," they were not "improper in any way" and thus were not "false or fraudulent." Motion to Dismiss for Failure to Allege False and Fraudulent Mailings, at 4.

The defendant's argument fails for two reasons. First, although the defendant correctly notes that legally required mailings are not generally mailings within the statute and to allege an offense, the government must show them to be false and fraudulent,[16] the Superseding Indictment does indeed contain allegations that the mailings were fraudulent in and of themselves. Each of the mailings were part of the tapping charge scheme which was itself fraudulent. For example, the Superseding Indictment states that the tapping charges consisted of a "proportional amount of the falsely inflated cost of the waterline as certified by the defendant." Superseding Indictment, at 3. Davis mailed this falsely inflated cost certification on or about May 5, 1981. The other mailings were part of the collection process of the inflated tapping charges and thus were also inherently fraudulent.[17]

Second, the defendant is not successful in denying that the mailings were false or fraudulent. The defendant argues that the "fair and reasonable" charges were not "improper," and thus were not "false or fraudulent," but this argument is fallacious. The defendant's syllogism slides from "fair and reasonable," to "not improper," to "not false or fraudulent" and these terms are not equivalents. To say that the victim, Richard Schultz paid a

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[16] *See United States v. Gray*, 790 F.2d 1290, 1298 (6th Cir. 1986), *rev'd on other grounds sub nom. McNally v. United States*, 107 S. Ct. 2875 (1987).

[17] The mailings charging Richard Schultz for fees relating to only three of many acres which he owned are no less fraudulent simply because of their limited applicability. A small fraud is no less a fraud than a big one.

tapping charge which was within the range of "fair and reasonable" does not mean he was not defrauded.

Even assuming that Schultz paid a "fair" price, if Schultz should have been the beneficiary of tapping charges at a "bargain," "discount," or "low price," and Davis' falsely inflated cost certification raised the price to "fair" or "normal," then Davis has fraudulently deprived Schultz of the benefit of the bargain. *See United States v. Bibby*, 752 F.2d 1116 (6th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986).[18] This overstatement defrauded Schultz just as surely as would inflating the tapping charges from "normal" and "fair" to "above normal." [19]

Therefore, the government successfully alleged an offense since the Superseding Indictment describes mailings which were an inherent part of the scheme to inflate the tapping charges and defraud present and future property

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[18] The Sixth Circuit addressed the very argument raised by Davis and rejected it in *Bibby*. In *Bibby*, Honeywell employees skimmed money from the proceeds of a sale of a Honeywell computer to Shelby County, Tennessee. They also paid a state senator a $150,000 fee to use his influence to encourage Shelby County to make the purchase. The defendants had argued that the sale was within Honeywell's usual range and that Shelby County paid less than a retail price. Thus, the defendants argued, there was no fraud since both buyer and seller "benefitted from a good bargain." *Id.* at 1126.

In response, the Sixth Circuit stated that the "defendant's logic is not convincing." *Id.* "The fact remains that" had the state senator not received his fees and had the employees not skimmed money from the sale, "the sales price would have been even lower." *Id.*

[19] To illustrate, assume that charges stemming from an accurate cost certification would be $1400 per acre, but that a fair price is $3100. For Davis to inflate his cost statement and charge the "fair" price of $3100 deprives Schultz of $1600. This fraud harms Schultz just as much as one that caused Schultz to pay $4700 per acre if a true cost certification would give rise to a $3100 "fair" charge.

owners in the Squirrel Bend subdivision. Even if Schultz paid a "fair and reasonable" price, Davis defrauded him of the bargain or discount he should and would have obtained, but for Davis' overstatement of the cost. The Court finds the defendant's Motion to Dismiss the Superseding Indictment for Failure to Allege False and Fraudulent Mailings to be without merit and thus is DENIED.

VI.

Sixth, the defendant moves to strike surplusage from the Superseding Indictment. "The court on motion of the defendant may strike surplusage from the indictment or information." Fed. R. Crim. P. 7(d). Here, the defendant alleges that paragraph 7 in the allegations of Count I is "prejudicial, irrelevant, immaterial, non-essential, unnecessary, and inflammatory." Motion to Strike Surplusage, at 3. Paragraph 7 provides:

> It was a further part of the scheme that Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, would refrain from collecting money in the form of inspection fees from the defendant, S. ROBERT DAVIS, which money was due the City of Upper Arlington in connection with the construction of the waterline in the Squirrel Bend subdivision.

The defendant subsequently requested the Court to expand his motion to include paragraph 8 of Count I. Request to Expand Motion to Strike Surplusage. Paragraph 8 provides:

> It was a further part of the scheme that in consideration of Harold W. Hyrne's cooperation, acting in his capacity as City Manager of the City of Upper Arlington, Defendant S. ROBERT DAVIS would provide Hyrne with an opportunity to obtain valuable common stock at a cost to Hyrne substantially below its actual value.

The consideration of a Rule 7(d) motion is a matter for the Court to consider in its discretion, and is proper where "an indictment contains non-essential allegations that could prejudicially impress the jurors." *United States v. Kemper*, 503 F.2d 327, 329 (6th Cir. 1974), *cert. denied* 419 U.S. 1124 (1975); *see* 1 Wright, *Federal Practice and Procedures* § 127, at 426 (2d ed. 1982). The showing required under Rule 7 "is a rather exacting standard, and only rarely has surplusage been ordered stricken." *Id.* at 426-27 (footnote omitted). The defendant has not broken with this pattern since he cannot demonstrate that the allegations in paragraphs 7 and 8 of Count I are not essential. They are relevant to the overall scheme.

In this case, the Superseding Indictment charges Davis with concocting a scheme to reap illicit financial gain from the construction of a waterline in the Squirrel Bend subdivision. One part of the scheme was to inflate the tapping charges and another part of the scheme was to inflate the tapping charges and another part of the scheme was to minimize expense fees. The alleged mailings give the Court jurisdiction over the scheme as a whole. Since the alleged exchange of a stock discount for non-billing of fees was part of the scheme, allegations describing the exchange were relevant and do not merit a motion to strike.

The fact that the means used to achieve the end of financial gain included the corruption of a city official does not mean that this holding runs afoul of *McNally v. United States*, 107 S. Ct. 2875 (1987). First, Davis designed both parts of the scheme to achieve the goal of achieving financial gain, not simply for depriving citizens of "intangible rights" as Davis argues, Memorandum in Support of Expansion of Scope of Motion, at 2-3. Second, as long as the *end* of the scheme is financial gain, the fact that the *means* of the scheme included corruption of a public official is not fatal to the Superseding Indictment.

VII.

The defendant also moves for an order releasing to defense counsel the transcripts of the grand jury proceedings in order to discover whether the government disclosed to the grand jury the testimony of Richard Schultz, Larry Dock, Norman Hatch, and Dr. Juan Sotos, which the defendant believes would be exculpatory. The defendant also wishes to procure the grand jury transcripts in order to determine whether the government presented the grand jury with testimony of certain defense witnesses, defense exhibits, and cross-examination testimony of Harold Hyrne. Memorandum in Support of Expansion of Scope of Motion, at 1-2 n.1.

The defendant's motion is based on Federal Rule of Criminal Procedure 6(e)(3)(C)(ii), which provides:

> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made . . . when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.[20]

The defendant states that the government has a duty to submit to the grand jury all substantial evidence that may negate the guilt of the accused. If the government failed to present the testimony of these persons, the defendant argues, then the Court should dismiss the Superseding Indictment; had the jury known of their testimony, they might not have returned the Superseding Indictment.

The government argues first that the testimony of Schultz, Dock, Hatch, and Sotos would not be exculpatory.

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[20] "In the absence of such a showing, the proceedings of a grand jury are required to be kept secret. *United States v. Fife*, 573 F.2d 369 (6th Cir. 1976), *cert. denied sub nom. Klein v. United States*, 430 U.S. 933 (1977).

It states that when they testified that Davis did not defraud Schultz, they neither were aware of the false cost statement Davis allegedly submitted to Upper Arlington nor did they know of the alleged agreement between Davis and Hyrne.

Second, the government stated, the defendant's suspicion that insufficient evidence was before the jury did not rise to the level of an allegation of prosecutorial impropriety justifying dismissal. Thus, the defendant did not show sufficient grounds for justifying a breach of the veil of grand jury secrecy.

The Supreme Court has held consistently that Rule 6(e) "requires a strong showing of particularized need for grand jury materials before any disclosure will be permitted." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 443 (1983); *see Dennis v. United States*, 384 U.S. 855 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959). This standard requires the defendant to offer some factual support, and not mere conclusory allegations, regarding the disclosure and potential grounds for a motion to dismiss the indictment. *United States v. Fife*, 573 F.2d 369, 372 (6th Cir. 1976), *cert. denied sub nom. Klein v. United States*, 430 U.S. 933 (1977). The determination as to whether the defendant has met his burden, however, is a matter of discretion for the trial court. *United States v. Short*, 671 F.2d 178, 183 (6th Cir.), *cert. denied*, 457 U.S. 1119 (1982).

The Court does not believe that the defendant can successfully show a particularized need for the grand jury materials. He contends that if the prosecutor had presented to the grand jury the testimony of Schultz, Larry Dock, Norman Hatch, and Dr. Juan Sotos, there is a high probability that they might not have indicted Davis. The defendant notes in his Request to Expand Scope of Motion to Discover Certain Grand Jury Materials that the testimony of other witnesses would also have been persuasive to the jury. Counsel for the defense wishes to

inspect the grand jury transcripts in order to determine whether the government indeed presented their testimony. If the transcript fails to show a submission of their testimony, the defendant would move to dismiss the Superseding Indictment. This argument fails to show a particularized need for two reasons.

First, the defendant presents no factual support for his contentions that the grand jury was unaware of the trial testimony and that it would not have indicted Davis had it known of the testimony. He argues that the mere fact that these men testified in the way they did is prima facie evidence that the grand jury did not know of their statements. Such speculation does not rise to the level of "factual support" and cannot justify a breach of grand jury secrecy.[21]

Second, even if the government withheld this allegedly exculpatory evidence from the grand jury, dismissal of the Superseding Indictment would not be justified. If the defendant cannot hope to show grounds for dismissal, then the discovery of the grand jury materials would be futile and would not justify a breach of grand jury secrecy. *See* Fed. R. Crim. P. 6(e)(3)(C)(ii).

A dismissal is not warranted here since a prosecutor is under no obligation to present exculpatory evidence to the grand jury. *See, e.g., United States v. Ruyle*, 524 F.2d 1133 (6th Cir. 1975), *cert. denied*, 425 U.S. 934

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[21] The defendant may argue that he cannot show a particularized need to justify discovery without aid of the grand jury materials which he wishes now to discover. *See United States v. Mechanik*, 475 U.S. 66, 80 (1986) (Marshall, J., dissenting). That is, the defendant cannot state that the government failed to present crucial exculpatory evidence without perusing the transcripts which he wishes to secure and showing the absence of such evidence. This circularity may be frustrating, but the law nonetheless generates such a result, and it is for this reason that motions for the disclosure of grand jury materials "are rarely granted." *Id.* The defendant rather must produce evidence available outside of the transcripts which would justify disclosure.

(1976). Davis contends that the courts have carved an exception from this general rule: a prosecutor has a duty to present evidence if, "had the grand jury known of it, there is a high probability that they would not have indicted the defendant." Motion to Discover Certain Grand Jury Materials, at 3. The defendant, however, cannot support this proposition from any case authority within this circuit.[22]

Moreover, the defendant failed to meet its own test. Davis cannot show that the testimony of Richard Schultz, Larry Dock, Norman Hatch, and Dr. Juan Sotos would have convinced the grand jury to such a degree that there is a high probability that it would not have returned the Superseding Indictment. First, the subjective opinion of the victim Schultz that Davis did not defraud him is not convincing that Davis in fact committed no legal wrong.[23] Second, the credibility of the testimony of these witnesses is suspect since they were not aware of the agreement between Hyrne and Davis to inflate the cost certification statement. Although their testimony tends to show that

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[22] The defendant also argues that the government's counsel had an administrative obligation to disclose substantial exculpatory evidence to the grand jury, according to § 9-11.334 of the U.S. Attorney's manual. The Court, however, does not find that the allegedly exculpatory evidence is "substantial." Even if it were, however, "supervision of these duties are [sic] best left to agencies other than the federal courts." *United States v. Felice*, 481 F. Supp. 79, 83 (N.D. Ohio 1978).

[23] *Cf. United States v. Bibby*, 752 F.2d 1116 (6th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986). In *Bibby*, the defendants skimmed profits and an illegal fee from Honeywell's sale of a computer to Shelby County, Tennessee. *See supra* note 18. After rejecting the argument that the reasonableness of the purchase price is no proof that no fraud occurred, the court stated that "if Honeywell and Shelby County had known about these kickback and commissions, which were directly contrary to Honeywell policy, they would certainly have felt defrauded." *Id.* at 1126. Similarly, if Schultz had known of the inflated cost statement Davis allegedly submitted, he too might feel defrauded.

Schultz paid a "fair" "tap-in" charge, their ignorance of the fact that Davis allegedly inflated the charges adversely affects their credibility when the jury considers whether Davis defrauded Schultz or not.

The defendant also requests discovery to determine whether the government presented testimony of various witnesses, defense exhibits, and cross-examination testimony of Harold Hyrne. Memorandum in Support of Expansion of Scope of Motion, at 1-2 n.1. This evidence as well would fail to show to a high degree of probability that the jury would not have returned the Superseding Indictment. After all, a trial jury has already considered all of the allegedly exculpatory evidence and nonetheless convicted Davis.

In any case, the Court will not hear the defendant's arguments that the exculpatory evidence at the first trial was so strong that the verdict was against the weight of the evidence. The Court refuses to hold a "preliminary trial to determine the competency and the adequacy of the evidence before the grand jury." *Costello v. United States*, 350 U.S. 359, 363 (1956). The Fifth Amendment does not require such a hearing and the delay resulting from it would be substantial. *See id.* "An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge of the merits. The Fifth Amendment requires nothing more." *Id.*

Accordingly, the Court finds the defendant's Motion to Discover Certain Grand Jury Materials to be without merit, and it is, therefore, DENIED. Furthermore, Davis' Request to Expand Scope of Motion to Discover Certain Grand Jury Materials is unwarranted and thus is DENIED.

VIII.

The defendant also moves for a bill of particulars. The decision whether or not to "direct the filing of a bill of particulars," Fed. R. Crim. P. 7(f), is at the discretion

of the Court. *See United States v. Germain*, 411 F. Supp. 719, 727 (S.D. Ohio 1975). The purpose of a bill of particulars is "to provide a defendant with specifics omitted from the indictment which are necessary for a preparation of his defense and the avoidance of surprise at trial." *Id.*; *see generally* 1 C. Wright, *Federal Practice and Procedure* § 129 (2d ed. 1982) [hereinafter "1 Wright"].

A bill of particulars is neither a tool for eliciting matters of an evidentiary nature, *Germain*, 411 F. Supp. at 727, nor a means of uncovering the names of government witnesses prior to trial, *United States v. Largent*, 545 F.2d 1039, 1043-44 (6th Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977). The standard that guides the Court in consideration of a bill of particulars is whether the indictment fairly informs the defendant of the charges against him and enables him to plead an acquittal or conviction in bar of future prosecution for the same offense. *Hamling v. United States*, 418 U.S. 87, 117 (1974).

The defendant seeks various particulars concerning (1) communications in which the defendant agreed to the scheme or parts thereof, (2) the inspection fees which Hyrne allegedly failed to collect, (3) the cooperation by Hyrne which allegedly served as consideration for a discount stock sale to Hyrne, (4) the allegedly inflated cost statement used to justify inflated tapping charges, (5) the assessment of allegedly inflated tapping charges, (6) the collection of these tapping charges, and (7) charges that Davis willfully and knowingly caused certain letters to be delivered by mail in furtherance of the scheme.

The Court does not believe that the government is required to specify in the Superseding Indictment all of the contents of any communications Davis made, nor must the Superseding Indictment include the evidence supporting the specific allegations of inflating the cost of the waterline and overcharging property owners using the line. Given the nature of the offense charged, the Court

believes that it is sufficient to specify the time period during which the alleged scheme began and ended, its purpose, the general overt act or acts engaged in, and the principals involved. The Court finds that the government has adequately done so.

Moreover, the defendant's motion constitutes a request for matters of an evidentiary nature. The defendant has no right to wrest from the government a bill of particulars merely for the purpose of obtaining the government's evidence prior to trial. *See, e.g., Germain*, 411 F. Supp. at 727; 1 Wright, *supra*, § 129, 439-40 & n.25. The defendant already has adequate notice of the charges against him. *See id.* at 443. Thus, the Court finds the defendant's motion for a bill of particulars to be without merit and it is, therefore, DENIED.

IX.

Finally, the defendant filed two motions in limine for the exclusion of certain evidence. First, the defendant requests that the Court issue an order barring the testimony of the defendant's former wife, Marilyn Davis, because the defendant believes that she is likely to blurt out inflammatory versions of communications that may be protected by the marital privilege.

The defendant may invoke a marital privilege to prevent testimony as to confidential communications between married persons made during the marital relationship. *See, e.g., Blau v. United States*, 340 U.S. 332 (1951). The defendant is perfectly within his rights to voice an objection if the government were to seek such information at trial. To bar Marilyn Davis from testifying altogether, however, is indeed, as the government argues, excessive. Therefore, insofar as the defendant moves to prevent her from testifying, his motion is DENIED. The government states that it does not intend to seek from Marilyn Davis any testimony regarding confidential communications made during her marriage to the defendant. Thus, in-

asmuch as the defendant moves for exclusion of privileged testimony which the defendant expects the government to proffer, his motion is MOOT.

The second motion in limine concerns certain prior bad acts which the defendant expects the government to use in order to impeach the defendant. The evidence in question tends to prove (1) an alleged payment which Harold Hyrne, the former city manager of Upper Arlington, claims he received from Davis in return for Hyrne's approval of a sewer tap-in for the defendant's Henderson Road subdivision; (2) the defendant's gambling activities; (3) the defendant's alleged misrepresentation of his age as being 18, which was in an effort to procure a real estate license when Davis was in fact 16; and (4) a lease which Davis supposedly signed for someone else.

Since this material is of slight probative value and may be prejudicial, the Court finds the defendant's motion to be meritorious. Fed. R. Evid. 403, 404. Insofar as the defendant seeks to exclude evidence of the four acts listed above, then, the motion is GRANTED. As far as any other prior bad acts are concerned, the Court will hear objections as the government proffers such evidence, and therefore as far as the motion relates to any other prior bad acts, aside from those listed above, the motion is DENIED.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88-3944

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
S. ROBERT DAVIS,
Defendant-Appellant.

ORDER

[Filed June 16, 1989]

Before: NELSON and NORRIS, Circuit Judges; and FRIEDMAN, United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

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* Hon. Bernard A. Friedman sitting by designation from the Eastern District of Michigan.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

88-3944

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

S. ROBERT DAVIS,
Defendant-Appellant.

ORDER

[Filed Nov. 21, 1988]

Before: LIVELY and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge.

Pursuant to a superceding indictment returned on July 7, 1988, the defendant was charged with mail fraud. He filed a motion to dismiss that indictment on grounds it violated double jeopardy and was barred by the statute of limitations found in 18 U.S.C. § 3282. The district court denied that motion and the defendant appealed.

Although the defendant asserts this Court has appellate jurisdiction to review both his double jeopardy and statute of limitations claims, he nonetheless has filed, as a precaution, a petition for a writ of mandamus directing the district court to dismiss the superceding indictment as time barred under § 3282. The plaintiff opposes that petition.

Upon consideration,

It is ORDERED that the mandamus petition is referred to the panel to which this appeal is assigned for a decision on the merits.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DISTRICT

No. CR-2-86-063

Judge Kinneary

UNITED STATES OF AMERICA,
Plaintiff,

v.

S. ROBERT DAVIS,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that Defendant S. Robert Davis hereby appeals to the United States Court of Appeals for the Sixth Circuit from the order, *inter alia*, denying Defendant's motions to dismiss the superseding indictment for violation of the Double Jeopardy Clause and based upon expiration of the applicable five-year statute of limitations, entered in this action on the 12th day of October, 1988.

Respectfully submitted,

/s/ Arthur F. Mathews
ARTHUR F. MATHEWS
STEPHEN W. PRESTON
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

/s/ John J. Chester
JOHN J. CHESTER
Chester, Hoffman & Willcox
8 East Broad Street
Columbus, Ohio 43215
(614) 221-4000
Counsel for Defendant
S. Robert Davis

Of Counsel:

Laura D. Byrne
5720 Avery Road
Amlin, Ohio 43002
(614) 889-1143

Dated: October 12th, 1988

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. CR-2-86-063
18 U.S.C. § 2
18 U.S.C. § 1341

UNITED STATES OF AMERICA,

vs.

S. ROBERT DAVIS,

SUPERSEDING INDICTMENT

[Filed July 7, 1988]

THE GRAND JURY CHARGES:

COUNT 1

Beginning in March, 1981, and continuing through January 2, 1982, in the Southern District of Ohio, S. ROBERT DAVIS, the defendant, devised and intended to devise a scheme or artifice to defraud, and to obtain money by means of false and fraudulent pretenses and representations, as more fully described in Section 3 of this Indictment, and, in furtherance of the scheme, did use or cause the use of the United States mails.

A. INTRODUCTION

1. At all times material to this Indictment, Harold W. Hyrne was City Manager of the City of Upper Arlington.

2. At all times material to this Indictment, S. ROBERT DAVIS was a resident of the City of Upper Arlington,

who arranged for construction of a waterline improvement at his private expense in and about a subdivision known as Squirrel Bend, located within the City of Upper Arlington.

3. Under a procedure set forth in the Upper Arlington City Code, defendant S. ROBERT DAVIS could certify a cost statement for the waterline improvement to Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, and based thereon the city would collect for the benefit of and payment to defendant S. ROBERT DAVIS, money in the form of a "tapping" charge from current and future property owners who would tap into the waterline.

B. THE SCHEME

4. It was a part of the scheme that Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, would accept whatever cost was certified by the defendant S. ROBERT DAVIS for the waterline, provided only that the cost certified should be approximately the same as the cost estimated by the city for the improvement.

5. It was a further part of the scheme that defendant S. ROBERT DAVIS, would certify to Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, a false cost statement for the waterline improvement in the Squirrel Bend subdivision, in the amount of $71,472.00, on the letterhead of Wright Brothers Excavating Company, Inc.

6. It was a further part of the scheme that Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, would approve a "tapping" charge in the amount of $3,100.00 per acre, plus interest from the date of completion of the waterline, money in payment for which was to be collected by the City of Upper Arlington on behalf of and paid to defendant S.

ROBERT DAVIS under authority of the Upper Arlington City Code, from current and future property owners who would tap into the waterline, such "tapping" charge representing a proportional amount of the falsely inflated cost of the waterline as certified by the defendant S. ROBERT DAVIS.

7. It was a further part of the scheme that Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, would refrain from collecting money in the form of inspection fees from the defendant S. ROBERT DAVIS, which money was due the City of Upper Arlington in connection with construction of the waterline in the Squirrel Bend subdivision.

8. It was further a part of the scheme that in consideration of Harold W. Hyrne's cooperation, acting in his capacity as City Manager of the City of Upper Arlington, Defendant S. ROBERT DAVIS would provide Hyrne an opportunity to obtain valuable common stock at a cost to Hyrne substantially below its actual value.

C. ACTS IN FURTHERANCE OF THE SCHEME

9. In furtherance of the scheme and to effect the objects thereof, S. ROBERT DAVIS, the defendant, performed or caused to be performed, among others, one or more of the following acts:

a. On or about March 11, 1981, the defendant, S. ROBERT DAVIS, caused a letter to be delivered to Harold W. Hyrne, requesting permission to construct a waterline improvement in the Squirrel Bend subdivision, at private expense pursuant to the Upper Arlington City Code.

b. On or about March 23, 1981, the defendant, S. ROBERT DAVIS, caused to be executed an agreement for Wright Brothers Excavating Company, Inc. to install a waterline improvement in Squirrel Bend for the sum of $36,296.54.

c. On or about May 5, 1981, the defendant, S. ROBERT DAVIS, caused a false cost statement for the waterline improvement in Squirrel Bend in the amount of $71,472.00 to be certified to Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington.

d. On or before June 4, 1981, Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, determined a "tapping" charge in the amount of $3,100.00 per acre for the Sqirrel Bend waterline based upon the false construction cost statement in the amount of $71,472.00 certified by the defendant, S. ROBERT DAVIS, the money for which was to be collected on behalf of and for the defendant, S. ROBERT DAVIS, from persons connecting to the waterline in accordance with the Upper Arlington City Code.

e. On or about June 4, 1981, the defendant, S. ROBERT DAVIS, caused a letter dated June 3, 1981, to be delivered to Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, requesting that persons who would connect to the waterline improvements in Squirrel Bend pay a "tapping" charge of $3,100.00 per acre.

f. On or about June 18, 1981, Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, caused a letter to be sent to Richard S. Schultz, 5050 Squirrel Bend, Upper Arlington, Ohio 43220, describing the "tapping" charges for the waterline, based on three acres for the Schultz homesite in the amount of $3,100.00 per acre.

g. On or about July 10, 1981, Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, caused a letter to be sent to James Feibel, Attorney at Law, 88 East Broad Street, Columbus, Ohio 43215, regarding collection of money for and on behalf of defendant S. ROBERT DAVIS, in the form of "tap-

ping" charges in the amount of $3,100.00 per acre for connecting to the waterline improvement in Squirrel Bend.

h. On or about August 4, 1981, Harold W. Hyrne, acting in his capacity as City Manager of Upper Arlington, received a letter, with money in the form of a check enclosed in the amount of $9,300.00, from James B. Feibel, 88 East Broad Street, Columbus, Ohio, for "tapping" charges collected for and on behalf of defendant S. ROBERT DAVIS by the City of Upper Arlington, and paid on behalf of Richard Schultz for his connecting to the waterline improvement in Squirrel Bend.

i. On or about August 13, 1981, Harold W. Hyrne, acting in his capacity ac City Manager of the City of Upper Arlington, caused check no. 015729 payable to Marilyn Davis and drawn on the bank account of the City of Upper Arlington in the amount of $9,300.00 for reimbursement for waterline "tapping" charges paid on behalf of Richard Schultz, to be sent to Marilyn Davis, 4300 Squirrel Bend, Upper Arlington, Ohio 43220, said reimbursement being money collected by the City of Upper Arlington for and on behalf of defendant S. ROBERT DAVIS.

j. On or about September 18, 1981, Harold W. Hyrne delivered to the business office of the defendant, S. ROBERT DAVIS, located in Columbus, Ohio, a check payable to Big Bite, Inc., and drawn on the personal bank account of Harold W. Hyrne in the amount of $8,625.75 in payment for fifteen hundred common shares of Big Bite, Inc., which shares then had an actual value of $11,625.00.

k. On or about January 2, 1982, the defendant, S. ROBERT DAVIS, caused a check to be issued to Wright Brothers Excavating in the amount of $36,296.54 in full payment for construction of the waterline improvement in Squirrel Bend.

D. THE MAILING

10. On or about June 18, 1981, in the Southern District of Ohio, the defendant, S. ROBERT DAVIS, for the purpose of executing the aforesaid scheme, and in attempting to do so, wilfully and knowingly did cause to be delivered by mail, according to the direction thereon, a letter from Harold W. Hyrne, in his capacity as City Manager of the City of Upper Arlington, addressed to Richard Schultz, 5050 Squirrel Bend, Upper Arlington, Ohio 43220.

In violation of 18 U.S.C. §§ 1341 and 2.

COUNT 2

1. The Grand Jury realleges and incorporates by reference all of the allegations contained in Count 1, paragraphs 1 through 9, as if fully rewritten herein.

2. On or about July 10, 1981, in the Southern District of Ohio, the defendant, S. ROBERT DAVIS, for the purpose of executing the aforesaid scheme, and in attempting to do so, wilfully and knowingly did cause to be delivered by mail, according to the direction thereon, a letter from Harold W. Hyrne, in his capacity as City Manager of the City of Upper Arlington, addressed to James Feibel, Attorney at Law, 88 East Broad Street, Columbus, Ohio 43215.

In violation of 18 U.S.C. §§ 1341 and 2.

COUNT 3

1. The Grand Jury realleges and incorporates by reference all of the allegations contained in Count 1, paragraphs 1 through 9, as if fully rewritten herein.

2. On or about August 3, 1981, in the Southern District of Ohio, the defendant, S. ROBERT DAVIS, for the purpose of executing the aforesaid scheme, and in attempting to do so, wilfully and knowingly did cause to

be delivered by mail, according to the direction thereon, a letter from James B. Feibel, Attorney at Law, addressed to Hal Hyrne, City Manager, City of Upper Arlington, Upper Arlington City Hall, Upper Arlington, Ohio, such letter containing a check in payment of tapping charges to the Squirrel Bend waterline.

In violation of 18 U.S.C. §§ 1341 and 2.

COUNT 4

1. The Grand Jury realleges and incorporates by reference all of the allegations contained in Count 1, paragraphs 1 through 9, as if fully rewritten herein.

2. On or about August 13, 1981, in the Southern District of Ohio, the defendant, S. ROBERT DAVIS, for the purpose of executing the aforesaid scheme, and in attempting to do so, wilfully and knowingly did cause to be delivered by mail, according to the direction thereon, a letter from the City of Upper Arlington addressed to Marilyn Davis, 4300 Squirrel Bend, Upper Arlington, Ohio 43220, which letter contained City of Upper Arlington check no. 015729, in the amount of $9,300.00, in reimbursement for a tap into the Squirrel Bend waterline.

In violation of 18 U.S.C. §§ 1341 and 2.

A True Bill.

/s/ _____
Foreman

/s/ D. Michael Crites
D. MICHAEL CRITES
United States Attorney

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. CR-2-86-063
18 U.S.C. § 2
18 U.S.C. § 1341

UNITED STATES OF AMERICA

vs.

S. ROBERT DAVIS

INDICTMENT

[Filed June 12, 1986]

THE GRAND JURY CHARGES:

COUNT 1

Beginning in March, 1981, and continuing through January 2, 1982, in the Southern District of Ohio, S. ROBERT DAVIS, the defendant, devised and intended to devise a scheme or artifice to defraud the citizens of the City of Upper Arlington, Ohio, of their rights to honest and faithful services from their public officials, and, in furtherance of the scheme, did use or cause the use of the United States mails.

A. INTRODUCTION

1. At all times material to this Indictment, Harold W. Hyrne was City Manager of the City of Upper Arlington.

2. At all times material to this Indictment, Harold W. Hyrne was under a duty of public trust to the citizens of Upper Arlington, Ohio, to perform the functions of his office openly, honestly, impartially, and free from corruption, undue influence, and fraud, without receiving, either directly or indirectly, any money or other valuable thing from the performance or non-performance of any act or duty pertaining to his office other than the compensation allowed by law.

3. At all times material to this Indictment, the defendant, S. ROBERT DAVIS was a resident of the City of Upper Arlington, who arranged for construction of a waterline improvement at his private expense, in and about a subdivision known as Squirrel Bend, located within the City of Upper Arlington.

4. Under a procedure set forth in the Upper Arlington City Code, the defendant, S. ROBERT DAVIS could certify a cost statement for the waterline improvement to Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, who would collect on behalf of the defendant, S. ROBERT DAVIS a "tapping" charge from current or prospective property owners who would tap into the waterline.

B. THE SCHEME TO DEFRAUD

5. It was a part of the scheme to defraud that Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, would not question whatever cost was certified by the defendant, S. ROBERT DAVIS for the waterline, provided only that the cost certified should be approximately the same as the cost estimated by the city for the improvement.

6. It was a further part of the scheme to defraud that the defendant, S. ROBERT DAVIS certified to Harold W. Byrne, acting in his capacity as City Manager of the City of Upper Arlington, a false cost state-

ment for the waterline improvement in the amount of $71,472.00, when in truth and fact and as the defendant, S. ROBERT DAVIS well knew, he would pay only $36,296.54 to Wright Brothers Excavating Company, Inc., for construction of the waterline.

7. It was a further part of the scheme to defraud that Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, approved a "tapping" charge in the amount of $3,100.00 per acre plus interest from the date of completion of the waterline, to be collected on behalf of the defendant, S. ROBERT DAVIS under authority of the Upper Arlington City Code, from any current or prospective property owner who would tap into the waterline, such "tapping" charge representing a proportional amount of the cost of the waterline as falsely certified in the amount of $71,472.00 by the defendant, S. ROBERT DAVIS.

8. It was a further part of the scheme to defraud that the defendant, S. ROBERT DAVIS provided a $3,000.00 credit for, and an opportunity to purchase, common stock in Big Bite, Inc., to Harold W. Byrne, in exchange for Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, not collecting inspection fees from the defendant, S. ROBERT DAVIS which were due the City of Upper Arlington in connection with the waterline.

C. ACTS IN FURTHERANCE OF THE SCHEME TO DEFRAUD

9. In furtherance of the scheme to defraud and to effect the objects thereof, S. ROBERT DAVIS, the defendant, performed or caused to be performed, among others, one or more of the following acts:

a. On or about March 11, 1981, the defendant, S. ROBERT DAVIS caused a letter to be delivered to Harold W. Hyrne, requesting permission to contruct a water-

line improvement at private expense, pursuant to the Upper Arlington Code in Squirrel Bend.

b. On or about March 23, 1981, the defendant, S. ROBERT DAVIS caused to be executed an agreement for Wright Brothers Excavating Company, Inc., to install a waterline improvement in Squirrel Bend for the sum of $36,296.54.

c. On or about May 5, 1981, the defendant, S. ROBERT DAVIS caused a false cost statement for the waterline improvement in Squirrel Bend in the amount of $71,472.00 to be certified to Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington.

d. On or before June 4, 1981, Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington, determined a "tapping" charge in the amount of $3,100.00 per acre to be collected from persons connecting to the waterline, said charge being based upon a false construction cost statement in the amount of $71,472.00 certified by the defendant, S. ROBERT DAVIS.

e. On or about June 3, 1981, the defendant, S. ROBERT DAVIS caused a letter to be delivered to Harold W. Byrne requesting that persons who would connect to the waterline improvements in Squirrel Bend pay a "tapping" charge of $3,100.00 per acre.

f. On or about June 18, 1981, Harold W. Hyrne, acting in his capacity as City Manager of the City of Upper Arlington caused a letter to be sent to Richard S. Schultz, 5050 Squirrel Bend, Upper Arlington, Ohio 43220, describing the "tapping" charges for the waterline, based on three acres for the Schultz homesite in the amount of $3,100.00 per acre.

g. On or about July 10, 1981, Harold W. Hyrne acting in his capacity as City Manager of the City of Upper Arlington caused a letter to be sent to James Feibel, At-

torney at Law, 88 East Broad Street, Columbus, Ohio 43215, regarding collection of "tapping" charges in the amount of $3,100.00 per acre for connecting to the waterline improvement in Squirrel Bend.

h. On or about August 4, 1981, Harold W. Hyrne, acting in his capacity as City Manager of Upper Arlington, received a letter, with a check enclosed in the amount of $9,300.00, from James B. Feibel, 88 East Broad Street, Columbus, Ohio, for "tapping" charges paid on behalf of Richard Schultz for his connecting to the waterline improvement in Squirrel Bend.

i. On or about August 13, 1981, Harold W. Byrne, acting in his capacity as City Manager of the City of Upper Arlington, caused check No. 015729 payable to Marilyn Davis and drawn on the bank account of the City of Upper Arlington in the amount of $9,300.00 for reimbursement for waterline "tapping" charges paid on behalf of Richard Schultz, to be sent to Marilyn Davis, 4300 Squirrel Bend, Upper Arlington, Ohio 43220.

j. On or about September 18, 1981, Harold W. Hyrne delivered to the business office of the defendant, S. ROBERT DAVIS, located in Columbus, Ohio, a check payable to Big Bite, Inc., and drawn on the personal bank account of Harold W. Hyrne in the amount of $8,625.75 in payment for fifteen hundred common shares of Big Bite, Inc., which shares then had an actual value of $11,625.00.

k. On or about January 2, 1982, the defendant, S. ROBERT DAVIS caused a check to be issued to Wright Brothers Excavating in the amount of $36,296.54 in full payment for construction of the waterline improvement in Squirrel Bend.

D. THE MAILING

10. On or about June 18, 1981, in the Southern District of Ohio, the defendant, S. ROBERT DAVIS, for the

purpose of executing the aforesaid schemes and artifice to defraud, and in attempting to do so, willfully and knowingly did cause to be delivered by mail, according to the direction thereon, a letter from Harold W. Hyrne, in his capacity as City Manager of the City of Upper Arlington, addressed to Richard Schultz, 5050 Squirrel Bend, Upper Arlington, Ohio 43220.

In violation of 18 U.S.C. §§ 1341 and 2.

COUNT 2

1. The Grand Jury realleges and incorporates by reference all of the allegations contained in Count 1, paragraphs 1 through 9, as if fully rewritten herein.

2. On or about July 10, 1981, in the Southern District of Ohio, the defendant, S. ROBERT DAVIS, for the purpose of executing the aforesaid scheme and artifice to defraud, and in attempting to do so, willfully and knowingly did cause to be delivered by mail, according to the direction thereon, a letter from Harold W. Hyrne, in his capacity as City Manager of the City of Upper Arlington, addressed to James Feibel, Attorney at Law, 88 East Broad Street, Columbus, Ohio 43215.

In violation of 18 U.S.C. §§ 1341 and 2.

COUNT 3

1. The Grand Jury realleges and incorporates by reference all of the allegations contained in Count 1, paragraphs 1 through 9, as if fully rewritten herein.

2. On or about August 3, 1981, in the Southern District of Ohio, the defendant, S. ROBERT DAVIS, for the purpose of executing the aforesaid scheme and artifice to defraud, and in attempting to do so, willfully and knowingly did cause to be delivered by mail, according to the direction thereon, a letter from James B. Feibel, Attorney at Law, addressed to Hal Hyrne, City Manager,

City of Upper Arlington, Upper Arlington City Hall, Upper Arlington, Ohio, such letter containing a check in payment of tapping charges to the Squirrel Bend waterline.

In violation of 18 U.S.C. §§ 1341 and 2.

COUNT 4

1. The Grand Jury realleges and incorporates by reference all of the allegations contained in Count 1, paragraphs 1 through 9, as if fully rewritten herein.

2. On or about August 13, 1981, in the Southern District of Ohio, the defendant, S. ROBERT DAVIS, for the purpose of executing the aforesaid scheme and artifice to defraud, and in attempting to do so, willfully and knowingly did cause to be delivered by mail, according to the direction thereon, a letter from the City of Upper Arlington addressed to Marilyn Davis, 4300 Squirrel Bend, Upper Arlington, Ohio 43220, which letter contained City of Upper Arlington check no. 015729, in the amount of $9,300.00, in reimbursement for a tap into the Squirrel Bend waterline.

In violation of 18 U.S.C. §§ 1341 and 2.

A True Bill.

/s/ [Illegible]
Foreman

/s/ Anthony W. Nyktas
ANTHONY W. NYKTAS
United States Attorney

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-4076

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

S. ROBERT DAVIS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed March 8, 1988

BEFORE: ENGEL, KRUPANSKY, and NELSON, Circuit Judges.

PER CURIAM. The defendant, who had business dealings with a corrupt local government official, was found guilty of mail fraud. The defendant contends on appeal that he was convicted on the basis of a supposed scheme to deprive the citizenry of its "intangible rights" to honest and faithful services from the official. After this case was briefed, the United States Supreme Court held in *McNally v. United States*, 483 U.S. ——, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), that one may not be convicted of mail fraud under a pure "intangible rights" theory. We shall reverse the defendant's conviction on that basis.

The defendant, S. Robert Davis, was indicted in June 1986 for a scheme allegedly begun in March 1981 and continued through January 2, 1982. The indictment charged that in violation of the mail fraud statute, 18 U.S.C. § 1341, "S. ROBERT DAVIS, the defendant, devised and intended to devise a scheme or artifice to defraud the citizens of the City of Upper Arlington, Ohio, of their rights to honest and faithful services from their public officials, and, in furtherance of the scheme, did use or cause the use of the United States mails." The alleged scheme involved a waterline constructed by the defendant at his own expense in and about a subdivision known as Squirrel Bend, located in the City of Upper Arlington, Ohio. Under a local ordinance, the defendant could certify the costs of construction to the city, and, based upon the cost certification, the city would then collect and remit to the defendant a tap-in charge from residents wishing to tap into the waterline.

The indictment charged that Harold W. Hyrne, the city manager at the time, agreed not to question costs certified by the defendant as long as such costs approximated those previously estimated by the city; that Mr. Hyrne used an inflated cost certification submitted by the defendant to calculate a tap-in charge to a property owner; and that Mr. Hyrne and the defendant agreed that in exchange for the defendant's later giving Mr. Hyrne an opportunity to purchase some common stock at a discount, Mr. Hyrne would not collect certain inspection fees from the defendant. The indictment charged four counts of mail fraud based on four mailings made in the process of collecting and transmitting the tap-in charge.

The case was tried to a jury under the "intangible rights" theory. Under this theory, as the jury was told during the prosecutor's opening statement, "[y]ou don't have to be concerned about depriving a person of money. A person or a city or citizens of a municipal corporation in Ohio can be deprived of their rights to honest and

faithful government." Under this theory, deprivation of money or property of the citizens is not necessary for conviction. The court so charged the jury:

> "The first element the Government must prove beyond a reasonable doubt is the existence of a scheme or artifice to defraud. A scheme or artifice to defraud means some plan or course of action intended to deceive others and to deprive them of something of value. A scheme to defraud under the mail fraud statute can include the knowing and willful defrauding of the citizens of a city of their right to have the affairs of the city conducted in a fair, honest and faithful manner, free from corruption or self-dealing, between its elected or appointed officials and others doing business with the city. Although it is not necessary that the Government prove all of the details charged in the portion of the indictment describing the scheme to defraud, it is necessary that the Government prove beyond a reasonable doubt one or more acts sufficient to establish the existence of the scheme to defraud."

The jury was thus permitted to find the defendant guilty of mail fraud, under the intangible rights theory, without finding that anyone was wrongly deprived of money or property.

In *McNally v. United States*, 483 U.S. ——, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), the Supreme Court held that the mail fraud statute is limited to protection of money or property rights and that jury instructions that fail to require a finding that anyone has been defrauded of money or property are infirm, under the statute. *Cf. United States v. Murphy*, —— F.2d ——, (6th Cir. 1988).

The indictment in the case at bar does not properly allege a violation of the mail fraud statute. In its initial paragraph the indictment defines the scheme to defraud

as one directed at the "rights [of citizens of the Upper Arlington] to honest and faithful services from their public officials . . . ." Although in later paragraphs the indictment avers facts that may have involved a deprivation of property or money, nowhere is there an averment that the purpose or result of the scheme was to obtain property or money for the defendant. The mail fraud statute does not require that a scheme to defraud be successful, but only that the scheme existed and a mailing was made in furtherance of it; the allegations involving the assessment and payment of money were therefore not essential to the crime as charged. We shall not strain to construe this defective indictment as implicitly charging that the purpose of the scheme was to deprive someone of money, as opposed to depriving the citizens of Upper Arlington of their "rights to honest and faithful services from their public officials . . . ." See *United States v. Heller*, 579 F.2d 990, 999 (6th Cir. 1978).

> "In order to be valid, an indictment must allege that the defendant performed acts which, if proven, constituted a violation of the law that he or she is charged with violating. If the acts alleged in the indictment did not constitute a violation of the law that the defendant has been charged with violating, we must reverse any subsequent conviction based on that indictment. *See McNally v. United States*, —— U.S. ——, ——, 107 S.Ct. 2875, 2881, 97 L.Ed.2d 292 (1987) (*quoting Fasulo v. United States*, 272 U.S. 620, 629, 47 S.Ct. 200, 202, 71 L.Ed. 443 (1926))."

United States v. Gimbel, 830 F.2d 621, 624 (7th Cir. 1987).

Here the jury could have found that there was no financial result from the false certification, and could still have concluded, under the indictment and under the court's charge, that a crime had been committed. In *Gimbel* the Court of Appeals for the Seventh Circuit re-

jected an argument that if the scheme had not been undertaken the government "might have" assessed tax deficiences against the defendant; that court stated:

> "[t]he relevant fact . . . is that the jury was not required to find that the scheme resulted in the government being deprived of money or property."

Gimbel, 830 F.2d at 627 (footnote omitted). That analysis applies to the indictment in the instant case.

We REVERSE the defendant's conviction and REMAND the case to the district court with instructions to dismiss the indictment.

Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-67

In the Supreme Court of the United States

OCTOBER TERM, 1989

S. ROBERT DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

SIDNEY M. GLAZER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

25 pp

QUESTIONS PRESENTED

1. Whether, when petitioner's convictions for mail fraud have been reversed because the indictment was insufficient under *McNally* v. *United States*, 483 U.S. 350 (1987), the Double Jeopardy Clause bars petitioner's retrial under a superseding indictment that is consistent with *McNally*.

2. Whether the Double Jeopardy Clause entitles petitioner to a determination by the court of appeals of the sufficiency of the evidence presented at his prior trial before he can be retried under a superseding indictment.

3. Whether the court of appeals has jurisdiction over petitioner's pretrial appeal from an order denying his motion to dismiss the indictment on the basis of the statute of limitations.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-67

S. ROBERT DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 873 F.2d 900. The opinion of the district court (Pet. App. 20a-50a) is reported at 714 F. Supp. 853. An opinion of the court of appeals in a previous appeal (Pet. App. 69a-73a) is unpublished, but the decision is noted at 841 F.2d 1127 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1989. A petition for rehearing was de-

nied on June 16, 1989 (Pet. App. 51a). The petition for a writ of certiorari was filed on July 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted in 1986 on four counts of mail fraud. The court of appeals reversed the convictions, holding that the indictment was invalid under *McNally* v. *United States*, 483 U.S. 350 (1987). The grand jury returned a superseding indictment alleging a theory of mail fraud consistent with *McNally*, and the district court denied petitioner's motions to dismiss the indictment under the Double Jeopardy Clause and the statute of limitations. Petitioner sought interlocutory review. The court of appeals affirmed the district court with respect to petitioner's double jeopardy claim; it dismissed his appeal from the pretrial denial of his statute of limitations defense, finding that it lacked jurisdiction with respect to that claim; and it denied a petition for a writ of mandamus challenging the district court's order on the statute of limitations defense.

1. The original indictment alleged that petitioner devised a scheme to defraud the citizens of Upper Arlington, Ohio, of their right to honest and faithful services from their public officials. Petitioner was charged under 18 U.S.C. 1341 with four counts of mail fraud, corresponding to four mailings alleged to have occurred between June 18, 1981, and August 13, 1981. Pet. App. 62a-68a.

Petitioner, who is a real estate developer, owned a house and a tract of vacant land, which he intended to subdivide, in Upper Arlington. Originally, the city planned to construct a public waterline to the area. The city estimated that the line would cost approxi-

mately $80,000, of which petitioner's share would have been approximately $60,000. Pet. App. 2a.

Prior to the start of the construction of the public waterline, petitioner contacted Harold Hyrne, Upper Arlington's city manager, and agreed to install the waterline at his own expense. The theory of the prosecution, as reflected in the original indictment, was that petitioner and Hyrne agreed that petitioner would submit—and that Hyrne would not question—an inflated cost certification for the project. Under a city ordinance, abutting property owners are allowed to tap into such a waterline without the builder's consent if they pay the builder a "tap-in" charge fixed by the city manager on the basis of the builder's cost. Thus, the inflated certification would result in correspondingly inflated tap-in charges payable to petitioner. As part of this scheme, the indictment alleged, petitioner was to provide Hyrne with a credit toward the purchase of certain common stock. See Pet. App. 63a-64a.

The government's evidence at trial tended to show that petitioner had the waterline installed for a contract price of $36,296.54, but provided Hyrne with a false statement showing a cost of $71,472 and reflecting the purchase of items that were not actually installed. On the basis of the $71,472 figure, Hyrne assessed Richard Schultz, one of petitioner's neighbors, a tap-in fee of $3100 per acre. Pet. App. 2a-3a, 14a-15a; Gov't C.A. Br. 16-17. The mailings on which the mail fraud counts were based were alleged to have taken place in connection with the collection of this fee from Schultz. Pet. App. 66a-68a. After a jury trial, petitioner was convicted on all four counts.

2. On appeal from the convictions, the court of appeals reversed and remanded with a direction to

dismiss the indictment. Pet. App. 69a-73a. Relying on this Court's decision in *McNally*, the court of appeals concluded that the indictment "[did] not properly allege a violation of the mail fraud statute," *id.* at 71a, since it did not aver that "the purpose or result of the scheme was to obtain money or property for the defendant," *id.* at 72a. The court did not reach petitioner's contention that the evidence was insufficient to sustain his conviction.

3. Ten days after the district court dismissed the original indictment in compliance with the court of appeals' mandate, the grand jury returned a superseding indictment. Pet. App. 55a-61a. The allegations of the superseding indictment were substantially the same as those of the original indictment, except that the superseding indictment alleged a "scheme or artifice to defraud, and to obtain money by means of false and fraudulent pretenses," *id.* at 55a, rather than to deprive Upper Arlington of the honest services of its officials.

Petitioner moved to dismiss the superseding indictment on the grounds, *inter alia*, that it was barred by the Double Jeopardy Clause and the statute of limitations. The district court denied the motion. Pet. App. 20a-50a. It concluded that the Double Jeopardy Clause did not bar a new trial because petitioner's convictions had not been reversed for insufficient evidence. *Id.* at 34a. The court held that the superseding indictment was timely under 18 U.S.C. 3288, which extends the period of limitations for six months when an indictment is dismissed on various enumerated grounds. Pet. App. 34a-38a.

4. Petitioner noticed an appeal from the district court's order insofar as it denied his motion under the Double Jeopardy Clause and the statute of limi-

tations, and he filed a petition for a writ of mandamus with respect to the latter issue. The court of appeals affirmed as to the Double Jeopardy Clause, dismissed for lack of jurisdiction as to the statute of limitations, and denied the petition for a writ of mandamus. Pet. App. 1a-19a.

a. The court of appeals held that its earlier decision reversing petitioner's convictions because of a defect in the original indictment did not foreclose a new trial under a valid superseding indictment. It noted that in *Burks* v. *United States*, 437 U.S. 1 (1978), *Montana* v. *Hall*, 481 U.S. 400 (1987), and *United States* v. *Scott*, 437 U.S. 82 (1978), this Court has established a general rule that a reversal on appeal for any reason other than insufficiency of the evidence does not bar a retrial. Pet. App. 7a. Distinguishing its decision in *Saylor* v. *Cornelius*, 845 F.2d 1401 (6th Cir. 1988), the court of appeals found no reason to depart from that rule based upon the facts of this case.[1] The panel observed that the decision to charge petitioner on an intangible rights theory was "perfectly legitimate when made, the intangible rights theory having been endorsed by [the Sixth Circuit] only weeks before in the very case that was ultimately to produce the *McNally* decision." Pet. App. 9a-10a. The court also noted that "[t]he prosecutor gained no unfair advantage by limiting the

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[1] In *Saylor*, apparently as a result of an oversight by the prosecutor, the jury was not instructed on the theory of criminal responsibility that the prosecution had proved at trial. The conviction was reversed because there was no evidence to support the theory that was submitted to the jury. The Sixth Circuit held that under these circumstances the defendant could not be retried on the theory on which the jury had not been instructed.

indictment * * * to an intangible rights theory" and that the circumstances of this case did not present a "potential for prosecutorial abuse" as in *Saylor*. *Id.* at 10a.

The court of appeals declined to determine whether the evidence admitted in petitioner's trial would have been sufficient to support a conviction under the intangible rights theory alleged in the original indictment or under the money or property theory on which petitioner was not tried. Pet. App. 12a-15a. The court added, however, that it did not think that the case presented at the prior trial "would have been frivolous under a 'money or property' indictment." *Id.* at 15a. Its "initial impression," which it noted was not to bind the district court, was that petitioner's contentions raised issues of fact. *Ibid.*

b. The court found that it lacked jurisdiction to review the denial of petitioner's statute of limitations claim, concluding that the district court's order on that issue would not be effectively unreviewable on appeal from a final judgment. Pet. App. 17a-19a. The court rejected petitioner's contention that the statute of limitations confers a right not to be tried that would be irretrievably lost if the appeal were not heard. It explained that statutes of limitations "acknowledge the state's right to try certain persons, but then set boundaries on the exercise of that power." *Id.* at 17a (quoting *United States* v. *Levine*, 658 F.2d 113, 127 (3d Cir. 1981)).

ARGUMENT

1. In *United States* v. *Ball*, 163 U.S. 662 (1896), this Court held that the Double Jeopardy Clause did not bar a defendant's retrial on a charge of murder after his conviction had been reversed because of a defect in the indictment. Similarly, in *Montana* v. *Hall*, *supra*, the Court concluded that a defendant could be reprosecuted after his first conviction had been reversed because the indictment was based on a statute that did not apply to his actions at the relevant time. These cases exemplify a "venerable principle[]" of double jeopardy jurisprudence: "The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, * * * poses no bar to further prosecution on the same charge." *United States* v. *Scott*, 437 U.S. at 90-91. Accord, *e.g.*, *Burks* v. *United States*, 437 U.S. at 13-14.

That principle governs this case. Petitioner's prior convictions were reversed because of a deficiency in the original indictment, not because of insufficiency of the evidence. Thus, as the court of appeals found, petitioner may properly be retried. "It is clear," as this Court said in *Montana* v. *Hall*, 481 U.S. at 404, "that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument."

Petitioner advances two grounds which, he contends, justify a different result on the facts of this case. As the court of appeals determined, both are without merit. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals, and it does not otherwise warrant this Court's review.

a. Petitioner argues that a new trial should be barred because the government was "responsible" for the reversal—*i.e.*, because it "deliberately" or "intentionally" tried petitioner on an indictment alleging an intangible rights theory of mail fraud in the face of petitioner's claim that such a theory was invalid. Pet. 15-22.

Setting aside petitioner's pejorative terms, this case is no different from virtually any other in which an appellate court holds that an indictment is defective. There is nothing unusual or unseemly about a case in which a defendant challenges the indictment by means of a pretrial motion to dismiss, the prosecution opposes the motion, the trial court denies it, and the case proceeds to trial and judgment of conviction. In any such case, it could be said that the prosecutor is "responsible" for the reversal because he has "deliberately," "intentional[ly]," and "obstinately" (*e.g.*, Pet. 15, 17, 19, 21) pursued an indictment after being placed on notice that it might later be held invalid. The position that petitioner advocates—which would bar a retrial when the prosecution has "chose[n] to rely on an invalid theory" in place of "a valid theory that was previously available but deliberately not pursued" (Pet. 15)—would effectively swallow the general rule of *Ball* and *Montana* v. *Hall*, *supra*.

By any objective measure, moreover, the decision to charge petitioner on the theory set out in the original indictment was entirely reasonable. On May 12, 1986, the Sixth Circuit upheld mail fraud convictions based on an indictment that alleged that the defendants had devised a scheme to defraud a State and its citizens of their right to honest government. *United States* v. *Gray*, 790 F.2d 1290 (1986), rev'd

sub nom. McNally v. *United States*, *supra*. The court of appeals noted in that case that "[c]ourts have long interpreted the mail fraud statute * * * as proscribing schemes to defraud the citizens of their intangible rights to honest and impartial government," citing decisions from five other circuits for that proposition. 790 F.2d at 1294. One month later, the grand jury returned an indictment against petitioner charging him on precisely the same theory that was approved in *Gray*. As the court of appeals stated here, that charging decision "was perfectly legitimate when made." Pet. App. 9a.

In any event, nothing in this Court's cases or double jeopardy principles suggests that the permissibility of a retrial should turn on whether an indictment, even though approved by the trial court, can be characterized as the product of a deliberate decision not to charge an available theory of criminal culpability. This much is clear from cases addressing mistrials granted on the defendant's motion. In that situation, the defendant may be retried unless "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Oregon* v. *Kennedy*, 456 U.S. 667, 679 (1982). That rule reflects the fact that a defendant who successfully moves for a mistrial is deemed to have relinquished his right to have his case concluded in a single trial; the only exception is for conduct that is so egregious that the defendant is effectively compelled to forgo that right. See *id.* at 673.

In a case like this one, the same general rule should apply. A defendant who moves for dismissal of an indictment and, after the motion is denied, preserves the point and successfully raises it on appeal, has

renounced his right to have his case concluded in a single trial. The Court reached a similar conclusion in a similar setting in *Lee* v. *United States*, 432 U.S. 23, 33 (1977). There, the defendant moved prior to attachment of jeopardy for dismissal of an information on the ground that it failed to allege specific intent. The trial court withheld decision until the close of the evidence and then granted the motion. This Court held that the case was controlled by decisions governing the permissibility of retrials following defendants' motions for mistrials. It relied on the fact that the defendant had not withdrawn the motion or otherwise suggested that it should not be determined. 432 U.S. at 34. Here, petitioner not only failed to withdraw his motion, but raised the insufficiency of the indictment on appeal.[2]

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[2] The concern that justified the recognition of the narrow exception to the general rule at issue in *Oregon* v. *Kennedy*, *supra*, is absent in the present setting. While there may be instances in which a prosecutor seeks to provoke a mistrial in order to secure a different jury, to obtain additional evidence, or to revamp trial strategy, he would have no conceivable reason to provoke the reversal of a conviction by preparing an indictment that is purposely insufficient. Even assuming that he could count on the indictment's passing muster in the trial court, a prosecutor who considered such a course could anticipate achieving either an acquittal barring retrial or a reversal on appeal that would place him back before the grand jury. There is no risk to the defendant's interests that might justify a rule requiring courts to assess the extent to which a prosecutor is at fault for an indictment determined on appeal to have been defective. Thus, reversal of the court of appeals' decision is not necessary to assure that there will be some "limit to the number of successive prosecutions the government can bring against a criminal defendant using superseding indictments that embrace the same events" (Pet. 15). See Pet. App. 10a (noting that there is no "potential for

b. Petitioner also contends (Pet. 8-15) that the Double Jeopardy Clause entitles him to a determination whether the evidence introduced at his trial was sufficient to sustain a conviction for mail fraud. The court of appeals correctly rejected that contention, emphasizing that petitioner's conviction had been reversed because of the defect in the indictment.

When an indictment has been dismissed because it fails to allege a valid legal theory, as in this case, it is "pointless" to determine whether the evidence would have sustained a conviction on the invalid theory. The question whether the government has proved a state of facts that does not constitute a crime has no legal significance and cannot properly control the applicability of the Double Jeopardy Clause. Moreover, it would be unjust to the government to test the evidence against whatever theories might have been alleged in a valid indictment. It is well established that a defendant may not "be tried on charges that are not made in the indictment against him." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960). Thus, the evidence that was introduced in a trial based upon an invalid indictment does not necessarily reflect the evidence that might be elicited at a trial on a valid superseding indictment. When a conviction is reversed because of a defect in the indictment, the government has not necessarily had its "one fair opportunity to offer whatever proof it could assemble," *Burks* v. *United States*, 437 U.S. at 16, and the public's interest in a determination of

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abuse" in this setting). No decision of which we are aware suggests that the Double Jeopardy Clause entitles a defendant to that kind of determination. And in any event, whatever the legal merits of such an approach might be, it could not conceivably bar a retrial on the facts of this case.

whether the defendant has committed a crime has not been satisfied.

No decision of this Court has addressed the precise question presented by this case. However, in *Richardson* v. *United States*, 468 U.S. 317 (1984), the Court held that when a prosecution ends in a mistrial because of a hung jury, a defendant is not entitled to a review of the sufficiency of the evidence before he is retried. The Court rejected the contention that the reasoning of *Burks* requires that type of review. Rather, the Court explained, *Burks* held only that "once a defendant obtained an unreversed appellate ruling that the Government had failed to introduce sufficient evidence to convict him at trial, a second trial was barred by the Double Jeopardy Clause." 468 U.S. at 323. The Court made clear that *Burks* did not "[lay] down some overriding principle of double jeopardy law that was applicable across the board in situations totally different from the facts out of which it arose." *Ibid.* The Double Jeopardy Clause did not entitle a defendant to a determination of evidentiary sufficiency in *Richardson*, the Court concluded, because the protection of the Clause "by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." 468 U.S. at 325.

The reasoning of *Richardson* is controlling here. A reversal on appeal based upon a defect in the indictment is no more the equivalent of an acquittal than is a mistrial based upon a hung jury. In terms of the language of the Double Jeopardy Clause and the interests it serves, it is hard to imagine how a defendant who has no right to a determination of the sufficiency of the evidence introduced against him when a jury is deadlocked would be entitled to such a determination when he is convicted and his con-

viction is reversed because of an error in the charging instrument. Surely, the defendant has no greater interest in a determination of the sufficiency of the evidence against him in that situation than in *Richardson*, and the public's interest in an error-free determination of the defendant's guilt is in no way diminished. See *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). There has been no "event" equivalent to an acquittal that might be said to change the nature of the defendant's "jeopardy." Thus, the court of appeals' decision on this point follows from *Richardson*.

Contrary to petitioner's suggestion (Pet. 11-12), *Lockhart* v. *Nelson*, 109 S. Ct. 285 (1988), does not support a different conclusion. In *Lockhart*, the Court held that when a conviction is reversed because evidence has been erroneously admitted, the fact that the remaining evidence is insufficient to sustain a conviction does not bar a new trial. The Court explained that if the trial court had made the correct evidentiary ruling at trial, the prosecutor would have had an opportunity to offer additional evidence that was available. Thus, the Court reasoned, requiring an appellate court to consider the erroneously admitted evidence "recreates the situation" that would have occurred if the trial court had ruled correctly. *Id.* at 291. Here, similarly, if the trial court had correctly foreseen this Court's *McNally* decision and dismissed the indictment, petitioner's retrial would have been permitted without a determination of evidentiary sufficiency even if the dismissal had occurred after the close of the evidence. See *Lee* v. *United States*, *supra*; *Richardson* v. *United States*, *supra*. Contrary to petitioner's contention (Pet. 11-12), *Lockhart's* summary of *Burks* (109 S. Ct. at 290) cannot be read to resurrect the proposition that this

Court laid to rest in *Richardson*—*i.e.*, that *Burks* implicitly entitles a defendant to review of the sufficiency of the evidence before a retrial whenever the trial court could have, but did not, enter a judgment of acquittal.

There is no conflict between the decision of the court below and decisions of other courts of appeals. The petition does not cite any case—and we are aware of none—in which a court of appeals has reversed a conviction because the indictment failed to charge an offense, but the court has nevertheless reviewed the sufficiency of the evidence.[3] There are

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[3] Petitioner is mistaken in his assertion (Pet. 14 & n.20) that *United States* v. *Snell*, 592 F.2d 1083 (9th Cir.), cert. denied, 442 U.S. 944 (1979), and *United States* v. *Hayes*, 676 F.2d 1359, 1363 n.1 (11th Cir.), cert. denied, 459 U.S. 1040 (1982), were cases of that type. In *Snell*, two defendants were convicted of conspiracy to commit bank robbery and attempted extortion, but the extortion convictions were reversed on appeal on the ground that any substantive offense that they had committed was chargeable, if at all, under the bank robbery statute. *United States* v. *Snell*, 550 F.2d 515 (9th Cir. 1977). In that appeal, the Ninth Circuit did not address the sufficiency of the evidence to sustain the extortion offense that had been charged. See *id.* at 519 (finding "ample evidence to support the convictions for conspiracy"). The court expressed no opinion on whether the evidence would have sustained a conviction for a substantive bank robbery offense, adding that "[w]hile we can speculate that Schmidt and Snell would likely have been convicted of attempted bank robbery under 18 U.S.C. § 2113(a), we obviously cannot convict them of an offense for which they were not charged or tried." *Id.* at 518. On remand, one of the defendants was charged with attempted bank robbery, and the district court dismissed the indictment, ruling that it was barred by the Double Jeopardy Clause. The Ninth Circuit reversed and reinstated the new indictment. In a footnote, the court explained that *Burks* presented no bar to a new trial since (as in this case) the

decisions, including at least one from the Sixth Circuit, that suggest that an appellate court should pass on the sufficiency of the evidence when it finds other forms of reversible error—for instance, in the admission of evidence, jury instructions, or other trial proceedings.[4] Those decisions do not, however, sug-

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prior reversal had been on grounds other than the sufficiency of the evidence. 592 F.2d at 1085 n.2. The court did not assess the sufficiency of the evidence on the reversed count in either appeal, and it did not suggest in any way that it was required to do so. *Snell* thus provides no support for petitioner's position.

The proceedings in *Hayes* followed a similar course. The court of appeals reversed a defendant's conviction because of a defect in the indictment and, in a subsequent appeal, rejected the claim that the Double Jeopardy Clause barred a new trial on a valid indictment. 676 F.2d at 1360-1361, 1362-1364. Neither that decision nor the prior decision, *United States* v. *Meacham*, 626 F.2d 503 (5th Cir. 1980), addressed a sufficiency of the evidence claim or suggested that the Double Jeopardy Clause entitled the defendant to such a determination.

In short, the decisions in this case, in *Snell*, and in *Hayes* are entirely consistent. In all three cases, the court of appeals reversed convictions because of a defect in the indictment and held that new trials were permitted without first assessing the sufficiency of the evidence introduced in the prior trials.

[4] See, *e.g.*, *United States* v. *Douglas*, 874 F.2d 1145, 1149-1151 (7th Cir. 1989) (erroneous jury instructions); *United States* v. *Morris*, 612 F.2d 483, 491-492 (10th Cir. 1979) (error in jury poll); *Palmer* v. *Grammer*, 863 F.2d 588, 591-592 (8th Cir. 1988) (erroneous admission of evidence); *Vogel* v. *Pennsylvania*, 790 F.2d 368, 376 (3d Cir. 1986) (split decision involving placement of burden of proof on insanity); *United States* v. *Hodges*, 770 F.2d 1475, 1477 (9th Cir. 1985) (erroneous admission of evidence); *United States* v. *Bibbero*, 749 F.2d 581, 585 (9th Cir. 1984) (failure to turn

gest that the permissibility of retrying a defendant whose conviction has been reversed based upon a defect in the indictment should depend on whether the evidence was sufficient to prove a state of facts that the court of appeals has determined is not a crime—or to establish a crime that was not charged.

2. Finally, petitioner contends that the denial of his motion to dismiss the indictment based upon the statute of limitations was immediately appealable under the collateral order doctrine. Pet. 22-27. There is no legal support for his claim. The only other court of appeals that has addressed the issue has agreed with the court in this case that orders of that type are not subject to appeal before a final judgment has been entered. *United States* v. *Levine*, 658 F.2d 113 (3d Cir. 1981); *United States* v. *Cerilli*, 558 F.2d 697, 699-700 (3d Cir. 1977). These decisions are entirely consistent with the general principles that this Court has established to limit interlocutory appeals in criminal cases. Further review of this question is not warranted.

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over Jencks Act material), cert. denied, 471 U.S. 1103 (1985); *United States* v. *Palzer*, 731 F.2d 1484 (11th Cir. 1984) (jury erroneously instructed to continue deliberating and return a unanimous verdict); *United States* v. *Sneed*, 705 F.2d 745, 748-749 (5th Cir. 1983) (error in jury selection procedures); *Delk* v. *Atkinson*, 665 F.2d 90, 92-93 (6th Cir. 1981) (unspecified trial errors); *United States* v. *Marolda*, 648 F.2d 623 (9th Cir. 1981) (jury instructions that varied from offense charged in the indictment). The courts of appeals are not in complete agreement as to whether the Constitution, as opposed to prudential considerations, mandates consideration of a claim of evidentiary insufficiency where a conviction must be reversed because of trial error. See *United States* v. *Douglas*, 874 F.2d at 1149-1151.

The delay inherent in interlocutory appeals is "particularly damaging to the conduct of criminal cases." *DiBella* v. *United States*, 369 U.S. 121, 124 (1962). Accord *United States* v. *MacDonald*, 435 U.S. 850, 853-854 (1978) (excessive delay is " 'fatal to the vindication of the criminal law' "). Thus, the presumption against piecemeal review "is at its strongest in the field of criminal law," *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982), and this Court has "interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness in criminal cases." *Flanagan* v. *United States*, 465 U.S. 259, 265 (1984).

Considered as a class, as they must be,[5] orders denying motions to dismiss an indictment on the basis of the statute of limitations have none of the three characteristics that are required to make them immediately appealable. See *Midland Asphalt Corp.* v. *United States*, 109 S. Ct. 1494, 1497-1498 (1989). As the Third Circuit noted in *Levine*, 658 F.2d at 121, such orders usually do not conclusively resolve a statute of limitations defense, since "the pretrial rejection of a limitations defense normally would not

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[5] This Court has repeatedly made clear that the appealability of pretrial orders cannot turn on the facts of a particular case. See, *e.g.*, *Van Cauwenberghe* v. *Biard*, 108 S. Ct. 1945, 1953 (1988); *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 438-440 (1985); *United States* v. *MacDonald*, 435 U.S. at 857-858 n.6. Thus, the fact that this case involves a dispute that turns on the interpretation of a statute, 18 U.S.C. 3288, and that can be determined on the face of the indictment, does not control the issue of appealability. In *Levine*, the Third Circuit properly refused, for instance, to define cases in which the expiration of the statute of limitations was manifest on the face of the indictment as a separable class for purposes of the collateral order doctrine. 658 F.2d at 120.

preclude the defendant from raising such a claim again should it appear in the course of trial that the government failed to carry the burden of proving that certain acts occurred within the statutory period." For related reasons, the issues presented by a statute of limitations are ordinarily not completely separate from the merits of an action. The main issue in a criminal proceeding is whether the government has proved that the defendant committed any of the crimes alleged in the indictment; the issue under the statute of limitations is the closely related one of whether, if any of the crimes occurred, they were committed within the limitations period. Finally, as the Third Circuit found, the denial of a pretrial motion to dismiss on statute of limitations grounds is not effectively unreviewable on appeal. The interests served by statutes of limitations may be effectively vindicated in an appeal from a final judgment. See *United States* v. *Levine*, 658 F.2d at 127-129. Those interests are comparable to those protected by the Speedy Trial Clause of the Constitution, which this Court has held does not "encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all." *United States* v. *MacDonald*, 435 U.S. 850, 861 (1978). "[L]imitations statutes acknowledge the state's right to try certain persons, but then set boundaries on the exercise of that power." *United States* v. *Levine*, 658 F.2d at 127.

In this case, the court of appeals found it necessary only to address the third element of the collateral order doctrine. It determined, consistent with *Levine*, that the denial of petitioner's pretrial statute of limitations motion would not be effectively unreviewable on appeal. Pet. App. 16a. Petitioner's attack on this

ruling focuses on the language of the statute of limitations, 18 U.S.C. 3282, which provides that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." Relying on *Midland Asphalt Corp.* v. *United States*, 109 S. Ct. at 1499, he contends that the language of Section 3282 confers "[a] right not to be tried in the sense relevant to the *Cohen* exception," *i.e.*, "an explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause * * * or the Speech or Debate Clause."

This argument misreads the Court's opinion in *Midland Asphalt*. The issue under the third prong of the collateral order doctrine is whether the order in question "involve[s] an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States* v. *MacDonald*, 435 U.S. at 860. While Section 3282 provides in part that defendants shall not be prosecuted and tried for crimes committed after the expiration of the limitations period, that right is not a "right not to be tried in the sense relevant to the *Cohen* exception," but is instead simply " 'a right whose remedy requires the dismissal of charges.' " *Midland Asphalt Corp.*, 109 S. Ct. at 1499 (quoting *United States* v. *Hollywood Motor Car Co.*, 458 U.S. at 269. *Midland Asphalt* therefore casts no doubt on the decisions of the courts of appeals that have rejected petitioner's position.[6]

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[6] On the merits of the statute of limitations claim, we believe that the district court was correct in holding (Pet. App. 34a-38a) that the superseding indictment was properly re-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

SIDNEY M. GLAZER
Attorney

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turned within the period permitted by 18 U.S.C. 3288. "Allowing a second indictment to remedy legal deficiencies present in the first is the very purpose for which § 3288 was enacted." *United States* v. *Charnay*, 537 F.2d 341, 354 (9th Cir.), cert. denied, 429 U.S. 1000 (1976).

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